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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 73-7031

JESSE THURMAN FOWLER,

Petitioner,

v.

THE STATE OF NORTH CAROLINA

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF FOR RESPONDENT

RUFUS L. EDMISTEN
Attorney General of North Carolina

JEAN A. BENOY
Deputy Attorney General

NOEL L. ALLEN
DAVID S. CRUMP
Attorneys

N. C. Department of Justice
P. O. Box 629
Raleigh, N. C. 27602
Attorneys for Respondent

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2 ABA, *Criminal Justice Bulletin*, No. 3, p. 3 (1974) 40,41

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1974

No. 73-7031

JESSE THURMAN FOWLER,

Petitioner,

v.

NORTH CAROLINA,

Respondent.

BRIEF FOR RESPONDENT

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Preamble of the Constitution of the United States which provides:

> "We the people . . . in order to . . . insure domestic tranquility . . . do ordain and establish this Constitution . . . . "

Article IV, Section 4 of the Constitution of the United States which provides:

> "The United States shall guarantee to every State in this Union a Republican[1] form of Government . . . . "

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1 "Republic, commonwealth, a popular state or

Article V of the Constitution of the United States which provides:

> " . . . Amendments, . . . shall be valid to all intents and purposes, as part of this Constitution . . . . "

The Fifth Amendment to the Constitution of the United States which provides:

> No person shall be held to answer for a capital . . . crime,[2] unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property without due process of law; . . . . "

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government; or a nation where the people have the government in their own hands." Vol. III, ENCYCLOPAEDIA BRITANNICA: or A DICTIONARY OF ARTS AND SCIENCES, 548, 1st Ed. (1771)

"republic, n. 1. a state in which the supreme power rests in the body of citizens entitled to vote and is exercised by representatives chosen . . . by them." THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, Unabridged, 1218 (1966)

2 "capital crime, such a one as subjects the criminal to capital punishment, that is, the loss of life." Vol. II, ENCYCLOPAEDIA BRITANNICA; or, A DICTIONARY OF ARTS AND SCIENCES, 1st Ed. (1771)

"Capital punishment is the execution of a criminal pursuant to a sentence of death imposed by a competent court." Vol. IV, ENCYCLOPAEDIA BRITANNICA (1969 Ed.)

"capital, adj. . . . 14. involving the loss of life: *capital punishment.* 15. punishable by death: *a capital crime; a capital offender.*" THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, Unabridged Ed., 219 (1966)

The Sixth Amendment to the Constitution of the United States which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . trial by an impartial jury . . . . "

The Eighth Amendment to the Constitution of the United States which provides:

> " . . . (C)ruel and unusual punishments (shall not) be inflicted."

The Tenth Amendment to the Constitution of the United States which provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The Fourteenth Amendment to the Constitution of the United States which provides:

> " . . . (N)or shall any State deprive any person of life, liberty, or property, without due process of law; . . . . "

Article I, Section 1 of the Constitution of North Carolina which provides:

> " . . . (A)ll persons are created equal; that they are endowed by their Creator with certain inalienable rights; . . . among these are life, (and) liberty . . . . "

Article I, Section 18 of the Constitution of North Carolina which provides:

> "All courts shall be open to every person for an injury done him in his . . . person . . . and shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay."

Article I, Section 19 of the Constitution of North Carolina which provides:

> "No person shall be taken, imprisoned, . . . or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion or national origin."

Article I, Section 22 of the Constitution of North Carolina which provides:

> " . . . (N)o person shall be put to answer any criminal charge but by indictment . . . . "

Article I, Section 24 of the Constitution of North Carolina, which provides:

> "No person shall be convicted of any crime but by the unanimous verdict of a jury in open court . . . . "

Article I, Section 27 of the Constitution of North Carolina which provides:

> "Excessive bail shall not be required . . . nor cruel or unusual punishments inflicted."

Article III, Section 5(b) of the North Carolina Constitution, which provides:

> "(T)he Governor may grant reprieves, commutations, and pardons, after conviction, for all offenses . . . . "

Article IV, Section 18(1) of the North Carolina Constitution, which provides:

> " . . . A District Attorney shall be chosen for a term of four years by the qualified voters . . . . "

Article XI. Section 2 of the North Carolina Constitution which provides:

> " . . . (M)urder, arson, burglary, and rape, and these only, may be punishable with death, if the General Assembly shall so enact."

North Carolina General Statute Section 11-1, which provides:

> "Whereas, lawful oaths for the discovery of truth and establishing right are necessary and highly conducive to the important end of good government; and being most solemn appeals to Almighty God, as the omniscient witness of truth and the just and omnipotent avenger of falsehood, such oaths, therefore, ought to be taken and administered with the utmost solemnity."

North Carolina General Statute Section 11-2, which provides:

> "Judges . . . and other persons who may be empowered to administer oaths, shall . . . require the party sworn to lay his hand upon the Holy Evangelists of Almighty God, in token of his engagement to speak the truth, as he hopes to be saved in the way and method of salvation pointed out in that blessed volume; and in further token that, if he should swerve from the truth, he may be justly deprived of all the blessings of the Gospel, and made liable to that vengeance which he has imprecated on his own head."

North Carolina General Statute Section 11-6, which provides:

> *"Oath to support Constitution of United States; all officers take.*–All members of the General Assembly, and all officers who shall be elected or appointed to any office of trust or profit within the State, shall, agreeably by act of Congress, take

the following oath or affirmation: *'I, A.B., do solemnly swear that I will support the Constitution of the United States; so help me, God.'*; which oath shall be taken before they enter upon the execution of the duties of the office."

North Carolina General Statute Section 11-7, which provides:

> *"Oath or affirmation to support State Constitution; all officers to take.*–Every . . . person who shall be chosen or appointed to hold any office of trust or profit in the State, shall, before taking his seat or entering upon the execution of the office, take and subscribe the following oath or affirmation: *'I, A.B., do solemnly and sincerely swear that I will be faithful and bear true allegiance to the State of North Carolina, and to the constitutional powers and authorities which are or may be established for the government thereof; and that I will endeavor to support, maintain and defend the Constitution of said State, not inconsistent with the Constitution of the United States, to the best of my knowledge and ability; so help me, God.'"*

North Carolina General Statute Section 14-230, which provides:

> *"Willfully failing to discharge duties.* If any . . . official of any State institutions, or of any county, city or town, shall willfully omit, neglect or refuse to discharge any of the duties of his office, for default whereof it is not elsewhere provided that he shall be indicted, he shall be guilty of a misdemeanor. If it shall be proved that such officer, after his qualification, willfully and corruptly omitted, neglected or refused to discharge any of the duties of his office, or willfully and corruptly violated his oath of office according to the true intent and meaning thereof, such officer shall be guilty of misbehavior in office, and shall be punished by removal therefrom under the sentence of the court as a part of the punishment for the offense, and shall also be fined or imprisoned in the discretion of the court."

North Carolina General Statute Section 14-17, which provides:

> "A murder (in the first degree) . . . shall be punished with death."[3]

North Carolina General Statute Section 15-187, which provides:

> " . . . (D)eath by the administration of lethal gas (is) substituted (for death by electrocution)."

North Carolina General Statute Section 15- 188, which provides:

> "The mode of executing a death sentence must in every case be by causing the convict or felon to inhale lethal gas of sufficient quantity to cause death, and the administration of such lethal gas must be continued until such convict or felon is dead . . . . "

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[3] As interpreted by the North Carolina Supreme Court in *State v. Waddell*, 282 N.C. 431, 194 S.E.2d 19 (1973) set forth in full text herein as Appendix A, reaffirmed in *State v. Jarrette*, 284 N.C. 670, 202 S.E.2d 750 (1974), set forth in full text herein as Appendix B; and as reenacted by the General Assembly of North Carolina on April 8, 1974.

QUESTIONS PRESENTED[4]

I

IS CAPITAL PUNISHMENT, IN AND OF ITSELF, CRUEL AND UNUSUAL PUNISHMENT WITHIN THE MEANING OF THE EIGHTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

II

DOES THE ADMITTED EXISTENCE OF THE INESCAPABLE FACT THAT APPROPRIATE PUBLIC OFFICIALS MUST IN GOOD FAITH, ACCORDING TO LAW AND THEIR OATHS OF OFFICE, USE THEIR HUMAN JUDGMENT AT THE PROSECUTORIAL STAGE, THE VERDICT STAGE AND POST JUDICIAL STAGE, IN AND OF ITSELF, BRING NORTH CAROLINA'S MANDATORY DEATH PENALTY FOR FIRST

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4 Petitioner states the two questions as a single question. However, careful analysis of the argument presented by petitioner reveals there are two separate and distinct questions raised. They are delineated and defined herein. Both are narrow legal questions involving *per se* rules of law and do not involve factual questions or *as applied*, principles of law.

Query whether Petitioner's brief has raised an additional question or changed the substance of the question already presented which is not in accord with Rule 40-1(d)(2) of the Supreme Court Rules. Respondent was under the impression Petitioner presented only the question of whether capital punishment *per se* violates the Eighth Amendment to the Constitution of the United States. Regardless, Respondent has addressed itself to both questions presented in Petitioner's brief and it may well be desirable for the Court to give a definitive answer to both.

DEGREE MURDER AND RAPE WITHIN THE PROHIBITIONS OF THE *FURMAN*[4a] DECISION?

STATEMENT OF THE CASE

Petitioner, a black man, armed with a .38 caliber pistol on a Sunday afternoon, stalked and shot to death John Griffin, a black man, who at the time was sick, unarmed, and on a public street visiting with two of his pre-teenaged daughters (App. p 8, ROA p. 16).

Upon indictment for first degree murder by the Grand Jury, Petitioner was prosecuted for that capital crime by the District Attorney in a trial to a jury of twelve.

The trial judge, a publicly elected official of the judicial branch of the government of North Carolina, charged the jury that it could return one of four possible verdicts: Guilty of first degree murder; Guilty of second degree murder; Guilty of voluntary manslaughter; or Not guilty. (Appendix pp. 69-84, ROA 100-122).

The jury rendered its unanimous verdict of guilty of first degree murder in open court (Appendix pp. 4-5, ROA pp. 4-9), and upon polling the jury, which was impaneled according to law, each juror was satisfied beyond a reasonable doubt that petitioner was guilty of first degree murder, (Appendix pp. 84-85, ROA 123-124).

There is no contention by Petitioner here, that the evidence was insufficient to support the verdict.

Following appropriately determined North Carolina law making death the only permissible punishment for first degree murder, Petitioner was sentenced to death to be induced by inhalation of lethal gas, (Appendix pp. 6 and 7, ROA 9-12).

Petitioner, upon review by the North Carolina Supreme Court, claimed that his sentence of death was cruel and unusual and therefore prohibited by the Eighth and Fourteenth

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4a *Furman v. Georgia*, 408 U.S. 238 (1972)

Amendments to the Constitution of the United States, and the Constitution of North Carolina, (Appendix p. 103).

The North Carolina Supreme Court rejected Petitioner's contention, and affirmed his conviction and sentence, (Appendix p. 104).

On October 29, 1974, this Court granted Petitioner's petition for a writ of certiorari to the North Carolina Supreme Court to review that decision and question.

HOW THE CONSTITUTIONAL QUESTIONS WERE PRESENTED AND DECIDED BELOW

Petitioner's first question raised below was that:

> " . . . (T)he death penalty in this case is cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 19, and 24 of the Constitution of the State of North Carolina." (Appendix p. 88, ROA 131).

Petitioner's second question raised below was that:

> "He further contends that capital punishment in North Carolina is still imposed in a selective and arbitrary manner, in violation of *Furman v. Georgia*, 408 U.S. 238, (1972)." Appendix p. 103).

The North Carolina Supreme Court rejected both contentions and affirmed Fowler's sentence of death (Appendix p. 104).

SUMMARY OF ARGUMENT

The purposes of government are set forth in the Preamble. Insuring "domestic tranquility" is coequal in importance to providing "for the common defense."

Just as the sovereign has delegated the power to its governing officials to "make war" and thus send some of its *finest* to a certain death to thwart a perceived threat to the nation from *without*, it has delegated the power to its governing officials to send its *worst* to a certain death to thwart a perceived threat to the nation's tranquility from *within*. Respondent has determined the crimes of first degree murder and first degree rape constitute such a grave threat.

The Constitutional limitations which do exist with regard to war are how it shall be made (Congress to declare and the President to be Commander in Chief).

Likewise, the Constitutional limitations which do exist with regard to capital punishment are in the manner by which the sentence is arrived at (due Process), and the manner by which it is carried out (non-discriminatory and not cruel and unusual).

Public officials performing their constitutional duties do not have an unbridled discretion at any stage of proceedings in a capital case, but are limited by law, evidence and their sacred oaths of office to exercise their *judgment, vis-a-vis discretion*, in accordance with law.

ARGUMENT

I

Introduction

Respondent will divide its introductory remarks into two segments: A. A statement on matters which are not controverted by Respondent though dwelt upon at length in Petitioner's "brief"; and B. Corrections of erroneous statements in Petitioner's "brief."

A. MATTERS NOT CONTROVERTED BY RESPONDENT.

1. Petitioner is a human being and most humans desire to live.

Many pages of Petitioner's encyclopaedic "brief" seem to have no purpose other than to depict Petitioner as a human being. The State so stipulates.

2. Additionally, Petitioner devotes many pages of his brief depicting the fact that those in prison awaiting a death sentence find it restrictive of their physical, mental and emotional being and generally, that death row is an undesirable place to be. The State so stipulates and affirmatively shows unto the Court that it specifically means for its death row to be a place of maximum security, and knows of no way it can provide a place of maximum security without concommitantly restricting a prisoner's mental and emotional self.

3. The prolonged period of time a person must await his execution and the concommitant unpleasant circumstances surrounding the wait is caused by the repetitive reviews of state Supreme Court decisions by one Judge federal district courts and three Judge federal appeals courts, not by the Respondent State's Courts. The State can and does meet the constitutional mandate of a speedy trial, as well as providing an Appellate review as of right by the State's highest court of review.[5]

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5 The chronology at page 1 of the Appendix demonstrates that nine months and ten days lapsed from the date of the murder until Respondent's Supreme Court had completed its review of the case and rendered its judgment.

Respondent considers its court to consist of seven Justices who are as mature, learned in the law, judicious, circumspect and dedicated to constitutional principles of free government as any federal Judge.

Thus the respondent State's government is not the causative agent for the complained of period spent by petitioner awaiting execution.

4. Respondent stipulates that the Governor of North Carolina does have the power to grant pardons and clemency to prisoners in the State's prisc d affirmatively shows that this Court has held this to be an unreviewable power in the hands of the chief executive.[6]

5. Respondent stipulates that its District Attorneys have the duty to exercise their respective judgments as to what crime the State's evidence warrants prosecuting, but shows unto the Court this judgment is a prerequisite to the carrying out of his constitutional duty, but the District Attorney's judgment must be exercised in accordance with law.

6. Respondent stipulates that its juries must exercise their respective judgments as to what crime, if any, the State's evidence has convinced them beyond a reasonable doubt an accused has committed. The respondent shows unto the Court that this exercise of judgment is a prerequisite to the performance of its constitutional duty and must be done in accordance with law.

7. Respondent stipulates that an appreciable[7] or noticeable segment of the population is opposed to capital punishment and that such a noticeable segment has existed during the entire history of North Carolina and the United States, but shows unto the Court that such fact of opposition

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6 *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147 (1872)

7 Appreciable. Capable of being readily perceived or estimated . . . (RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, Unabridged. (1966) at p. 73.

does not make capital punishment "cruel and unusual" any more than the fact that an appreciable or noticeable segment of the population is opposed to abortion makes an abortion a murder.[8] But Respondent notes that this Court has only recently determined that the mother's well-being and right to her life outweigh the right of the fetus to live. To some a fetus is a life in the same sense as is a fully developed man. And to that segment, this Court holds that a woman and her physician may take that totally innocent human life. Does that mean this Court is "arbitrary", "capricious", "discriminatory", or denying the fetus the "equal protection of law"?

Further, to an appreciable segment of society, the manner in which the United States became involved in Vietnam was in direct violation of the Constitution of the United States,[9] and pursuant to Presidential decree some 50,000 of our best have been deprived of their lives.

The Supreme Court, in denying review of those decisions,[10] recognized the power and correlative duty of the Executive and Legislative branches of government to determine when a sufficient threat to this nation's interest exists to warrant military action. It is a certainty that once military action commences, young Americans are doomed to death in an arbitrary manner where "some shall live while others may die."

Why, then, should this Court not recognize the power and duty of the legislative branch to determine when criminal conduct of murder and rape constitutes a sufficient threat to domestic tranquility to warrant the imposition of the death sentence by gas to the murderer and rapist?

8. Respondent stipulates that when all humans die from whatever cause there is a purplish appearance to their faces and fingernails which is commonly termed "cyanosis."

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8 *Roe v. Wade*, 410 U.S. 113 (1973)
Doe v. Bolton, 410 U.S. 179 (1973)

9 United States Constitution, Article I, Section 8, Cls. 1, states "The Congress shall have power . . . to declare war . . . ."

10 *DaCosta v. Laird*, 405 U.S. 979 (1972) and cases there cited, and *Massachusetts v. Laird*, 400 U.S. 886 (1970)

Respondent stipulates that immediately upon death of all human beings the rectal muscles lose their tension and the accumulated gastric pressures in the intestines push the accumulated feces out of the body. Respondent further stipulates that failure of the lungs to furnish oxygen to the blood stream causes all human beings to struggle, writhe, gasp, grasp and their chests to heave mightily to obtain more oxygen, and the eyes appear to bulge in their sockets.

However, Respondent submits that these are normal human reactions, which occur to every conscious person upon failure of the heart or lungs from whatever cause. These reactions are not unique or confined to those put to death by lethal gas.

The term "death throes" is described above and is commonplace.[11] The fact that some may faint upon seeing an execution likewise is not unique or so confined. Numerous people faint upon seeing blood while others who are otherwise hale and hearty men faint when they are about to be immunized with a needle and syringe.

The agony of death described by petitioner at pages 111-114 of his brief seems merciful when compared to the battlefield death. See THE OLD BREED, *A History of the First Marine Division in World War II*, George McMillan, Infantry Journal Press, 1949, at pages 286, 292-293, and 306.

There the author describes first hand accounts of the conditions at page 306:

> "The heat had become an important factor in the fight. A blazing sun, reflected off the white sand and coral, turned the entire arena into a scorching furnace. A few men who had fought desparately for three days in that inferno now began to collapse from heat exhaustion. There were fervent prayers for rain, or at least a cloudy sky

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11 Throe, n. 1. a violent spasm or pang; paroxysm. 2. a sharp attack of emotion. 3. throes, a. any violent convulsion or struggle. b. the agony of death . . . . (RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, Unabridged, p. 1479 (1966).

to shade the sun. Countless numbers suffered . . . from blistered faces and cracked, bleeding lips. The ragged terrain the regiment had penetrated, with its precipitous slopes on which weary, heavily laden troops expended themselves, contributed to the number of exhaustion victims."

First hand accounts of the death scene are described at pages 286, 292-293:

"I saw a ghastly mixture of bandages, bloody and mutilated skin; men gritting their teeth, resigned to their wounds; men groaning and writhing in their agonies; men out-stretched or twisted or grotesquely transfixed in the attitudes of death; men with their entrails exposed or whole chunks of body ripped out of them . . . .

"There was Graham, snuffed out a hero, lying with four dead Japs around him; and Windsor, flat on his face, with his head riddled by bullets and his arms pointed toward a pillbox where five Japs slumped over a machine gun; and Sharp, curled up on his side, still holding his automatic rifle . . . Stieferman was alive, his face and body peppered by shrapnel . . . .

"I saw McMatt lying on his side with a small hole in his stomach which oozed purple blood. Someone had taken off his clothes. Slowly he turned his head toward me, and I saw that his blue eyes were glassy. He opened his mouth, and his white lips formed a word, but no sound came forth. Exhausted by the effort he let his head slump back and blood was oozing from his mouth.

"LIFE magazine artist Tom Lea in his privately printed book, *Peleliu Landing*," wrote:

"Then I ran–to the right–slanting up the beach for cover, half bent over. Off balance, I fell flat on my face just as I heard the *whishhh* of a mortar I knew was too close.

A red flash stabbed at my eyeballs. About 15 yards away, on the upper end of the beach, it

smashed down four men from our boat. One figure seemed to fly to pieces. With terrible clarity I saw the head and one leg sail into the air. I got up, ran a few steps, and fell into a small shell hole as another mortar burst threw dirt on me. Lying there in terror looking longingly up the slope to better cover, I saw a wounded man near me, staggering in the direction of the amtracs. His face was half bloody pulp and the mangled shreds of what was left of an arm hung down like a stick, as he bent over in his stumbling, shock-crazy walk. The half of his face that was still human had the most terrifying look of abject patience I have ever seen. He fell behind me, in a red puddle on the white sand.

Mortar shells whished and whapped through the air over our heads. They hit without apparent pattern on the beach and in the reef at our backs. Turning my head seaward I saw a direct center hit on an amtrac. Pieces of iron and men seemed to sail slow-motion into the air. As bursts began to creep steadily from the reef in toward the beach, the shells from one mortar rustled through the air directly over our heads at intervals of a few seconds, bursting closer, closer.

Then a flat, cracking flash nearly burried me with sand. Wriggling out, and trying to wipe the sharp grains from my sweating eyelids, I saw in the clinging gray smoke that a burst had hit about six feet from my left foot, beyond the bank of loose sand at my side.

As I looked over my shoulder a burst smashed into a file of Marines wading toward our beach from a smoking amtrac. Jap machine guns lashed the reef with white lines and Marines fell with bloody splashes into the green water. The survivors seem so slow and small and patient, coming in there . . . ."

The Court may wish to compare the conditions complained of by Petitioner with the description in Vol. 5, ENCYCLOPAEDIA BRITANNICA, Death, 526, 528-529 (1974) under the caption "The Prospect of Dying" where the

author states "Studies on patients with terminal illnesses who face death imminently have revealed much of interest and psychosocial value regarding the personal response to the approach of death."

Respondent has copied and attached hereto as Appendix C the relevant contents of the article. Respondent does so merely to point out that petitioner's quoting from pathetic and sorrowful writings are misleading if they are meant to convey the scene at the death house as something unique to *it*, instead of that which is nearly universally true of all death.

Respondent contends the sovereign power of the nation "to provide for the common defense" to send its finest young men, who are guilty of nothing more than patriotism, to such deaths on a random basis to defend the nation from a perceived threat from *without* is no greater than the sovereign power of the nation "to insure domestic tranquility" to send duly convicted murderers and rapists to a quick death when that nation perceives the crimes of murder and rape as threats to its domestic tranquility from *within*.

There is nothing in the Constitution which limits the power of the government to make war, and there is nothing in the Constitution which limits the power of the government to implement the death sentence.

The limitations which do exist with regard to war are how it shall be made (Congress to declare and the President to be Commander in Chief).

Likewise, the limitations which do exist with regard to capital punishment are in the manner by which the sentence is arrived at (due Process), and the manner by which it is carried out (non-discriminatory and not cruel and unusual).

B. CORRECTION OF ERRONEOUS STATEMENTS IN PETITIONERS BRIEF

Petitioner's counsel in his brief at pages 16 through 19 has misinformed this Court when he states that following this Court's *Furman* decision, while other states "effectuated" the order of this Court, "North Carolina, however, took a very

different course." (Petitioner's Brief at pages 16-18).

Petitioner further states in his brief at pages 18-19:

> "Although the North Carolina Supreme Court had previously vacated several death sentences on *Furman* grounds, it ruled prospectively in *State v. Waddell*, . . . that the death penalty could continue to be imposed for North Carolina's four pre-*Furman* capital crimes without the enactment of new legislation."

while only noting in a footnote at page 23 of his brief that *Waddell* could not be sentenced to death consistently with the *ex post facto* clauses of the Federal and State Constitutions.

The *Waddell* decision is printed in its entirety herein as Appendix A for this Court's perusal. It is to be noted that North Carolina has followed this Court's decision in *Furman* to the letter just as every other state has. In every case in which a defendant was sentenced to death for a crime committed while the statutory provision was in effect which permitted the jury in its discretion to fix a sentence of life, the North Carolina Supreme Court has remanded the case to the trial court to impose a life sentence. A list including those cases is attached hereto as Appendix D.

What the North Carolina Supreme Court did in *Waddell* was to declare unconstitutional that portion of a statute which gave discretionary power to the jury to fix a sentence of life. That court, and only that court, had the constitutional right and duty to do so and no federal question is raised by that decision, and it is not now before this Court. Thus from the date of *Waddell*, the only permissible punishment for murder was death. Subsequently, the North Carolina General Assembly rewrote the statute making death the only punishment for first degree murder.

For all capital offenses *committed* prior to the date of the *Waddell* decision, the only permissible sentence in North Carolina is life imprisonment due to this Court's *Furman* decision.

It is interesting to note that where the issue was presented to five state Supreme Courts before their legislatures acted, two (Montana and South Carolina) decided the death penalty provision was unconstitutional while two, Delaware and North Carolina decided the discretionary power was void leaving death as the only punishment. Petitioner is just plain wrong when he says in his brief at page 21, Footnote 22, that *Dickerson* has been "nullified." The Delaware Supreme Court in *State v. Lenora Sheppard*, No. 162 (1974) decided December 30, 1974 said:

> "We are asked by defendant to reconsider *(Dickerson)*. We have done so . . . we are of the opinion that the conclusions reached in *Dickerson* are correct. We reaffirm and adhere to those conclusions." (Slip opinion pp. 5-6).[12]

Utah's Supreme Court did neither, merely characterizing this Court's *Furman* decision as "(expletive deleted)". *State v. Winkle*, ____ Utah ____, (1974)

Thus it is seen that Petitioner's characterization of the North Carolina Supreme Court's *Waddell* decision is, at best, hyperbole and at worst, disingenuous. But whichever the case may be, it is clear as clear can be that North Carolina's Supreme Court has not by "tortuous" reasoning (Petitioner's Brief p. 23) attempted to "emasculate a constitutional decision forbidding the imposition and carrying out of impermissible death sentences." (Petitioner's Brief p. 24). Some thirty states have reenacted some form of a mandatory death penalty since *Furman*, which fact is acknowledged in Petitioner's brief at page 17 and even summarized therein as Appendix A.

Thus, the only "tortuous" reasoning seen by respondent is that of petitioner's counsel in their journalistic and emotional jargon to keep this first degree murderer alive.

To illustrate, and then drop the point, petitioner contends the "contemporary standards" of civilized or decent

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12 Respondent notes in passing that one of Petitioner's counsel, a Mr. Amsterdam, was also counsel in the *Sheppard* case.

society condemn the death penalty. He then lists in his Brief a table of nations which have done so (Table 1 at p. 3d). Among those nations whose standards Petitioner wishes North Carolina to adopt are numerous South American nations. Considering that Chile only recently herded hundreds of its citizens into a stadium and machine-gunned them to death, respondent North Carolina, with a tip of the hat and thanks for the suggestion, replies "no thanks" to that standard of "decency" and "civilized society", or many other similar "standards" of some of those "civilized" nations listed on page 3d of petitioner's brief.

Other errors are contained in Petitioner's "brief" such as the calculations found in Footnote 145 at page 97 of his brief. A proper calculation for the years 1907-1915 shows there were 53 death sentences and 11 commutations, *i.e.*, a ratio of 11/53 or 20.75% (not 26.2% as stated by Petitioner), while during the years 1916-1940 there were 137 death sentences with 22 receiving commutations. Thus the ratio is 22/137 or 16.05% (not 19.1% as stated by Petitioner). The difference between the two periods chosen by Petitioner for purposes of illustration amount to only 4.7% (not 7%).

Petitioner cites as an "other" authority, Wicker, *"Christmas on the New Death Row,"* New York Times, December 25, 1973. In that article Wicker claims:

> " . . . (I)n North Carolina the White House plumbers would have received the death penalty for pulling the Watergate and Ellsberg burglaries."

Of course, most first year law students have learned that first degree burglary is an offense against the habitation and the purpose of the law in declaring Burglary in the nighttime to be such a serious offense was to protect the family at a time of repose and sleep from meditated harm.[13] In North Carolina breaking and enterings such as Watergate and Ellsberg's physicians office are not now, nor were they ever capital crimes. (See N.C. General Statutes §§14-51 and 14-54.)

In a concession to the shortness of life, Respondent's counsel acknowledges he has not checked for accuracy nearly

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13 *State v. Surles*, 230 N.C. 272, 52 S.E.2d 880 (1949)

all of the "authorities" cited in Petitioner's brief which consume twenty-nine (29) pages merely to list.

We do note however that many of the citations listed by Petitioner as "other authorities" can in no way be supportive of the proposition that the death penalty is cruel and unusual *per se*. For example *Elliot's Debates*, Thomson's *A Constitutional History of England, 1642-1801* and so forth.

II

CAPITAL PUNISHMENT IS NOT CRUEL AND UNUSUAL PUNISHMENT *PER SE* WITHIN THE MEANING OF THE EIGHTH AMENDMENT TO THE CONSTITUTION.

Article V of the Corstitution of the United States provides that " . . . Amendments, . . . shall be valid to all intents and purposes, as part of this Constitution . . . . " Thus, no Amendment is construed to create a unique corpus juris standing alone and alien to other parts of, and Amendments to, the Constitution; it being an elementary rule of constitutional construction that effect shall be given to every part and every word of the constitution with no portion of the fundamental law being treated as superflous.[14] It must be read in context and as an entire instrument.[15] As no constitutional guarantee enjoys preference, so none should suffer subordination or deletion.[16]

Justice Taney, in *Holmes v. Jennison*, 14 Pet (39 U.S.) 540, 570, 571 (1840) said:

> "In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the

14 *Wright v. United States*, 302 U.S. 583 (1938)
Myers v. United States, 272 U.S. 52 (1926)
15 *Downes v. Bidwell*, 182 U.S. 244 (1901)
16 *Ullman v. United States*, 350 U.S. 422 (1956), reh. den. 351 U.S. 928 (1956)

> whole instrument, that no word was unnecessarily used, or needlessly added."

And as recently as 1956, this Court said in *Ullman v. United States*, at pp. 428, 429:

> "Nothing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process . . . . To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it. This is to disrespect the Constitution."

A case does not require a "construction" (at least as the word "construction" is ordinarily used) when the constitutional provisions are positive and free from all ambiguity. Here, the Fifth Amendment expressly provides that "No person shall be held to answer for a capital . . . crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, . . . without due process of law . . . . "[17] A like provision is found in the Fourteenth Amendment " . . . nor shall any state deprive any person of life, . . . without due process of law; . . . .[18]

This Court has previously noted that when constitutional provisions are positive and free from all ambiguity they must be accepted by the courts as they read and in such a case no construction is permissible.[19] Thus the Court is not at liberty to search for meanings beyond the Constitution[20] and should not, by a resort to sophistication, restrict an obvious meaning.[21]

In *United States v. Sprague*, at page 731, this Court said:

> "*The Constitution was written to be understood by the voters*; its words and phrases were used in their

17 United States Constitution, Amendment V
18 United States Constitution, Amendment XIV
19 *Wright v. United States*, 302 U.S. 583 (1938)
20 *United States v. Sprague*, 282 U.S. 716 (1931)
21 *Maxwell v. Dow*, 176 U.S. 581 (1900)

> normal and ordinary, as distinguished from technical, meaning; *when the intention is clear there is no room for construction and no excuse for interpolation or addition.*" (Emphasis added)

Respondent submits it should be noted that the term capital punishment means the same thing today as it did in 1771, *supra*, page 2, Footnote 2.

While the spirit of the Constitution is to be respected no less than its letter, that spirit is to be collected from its words, and neither practice nor extrinsic circumstances can control its clear language.[22] Thus the Constitution is to be construed in the light of its purpose and should be given a practical interpretation.[23]

Indeed, the Federal Constitution is not concerned with claims of rights which are unclear and gain hold by subtle and involved reasoning.[24] Justice Douglas noted in the *Darlington* case at page 91:

> "The Constitution is concerned with practical, substantial rights, not with those that are unclear and gain hold by subtle and involved reasoning."

This is necessarily so in order that the plainly manifested purpose of those who created it may be carried out.[25] In the *Classic* case, this Court said at page 316:

> "Thence we read its (Constitution's) words, not as we read legislative codes, which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government."

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22 *Sturges v. Crowningshield*, 4 Wheat (U.S.) 122 (1819)
23 *Smiley v. Holm*, 285 U.S. 355 (1932)
24 *Federal Housing Administration v. Darlington, Inc.*, 358 U.S. 84 (1958)
25 *United States v. Classic*, 313 U.S. 299 (1941)
Perry v. Stancil, 237 N.C. 442, 75 S.E.2d 512 (1953)

"Those who created it" are the people, who according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives.[26]

Without question, one of the purposes of the people in establishing a government of limited and defined powers through a written constitution was to secure individual justice against oppressive government action. That was not, and is not the only purpose however.

The Preamble to the Constitution sets forth additional purposes, to wit: " . . . insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the Blessings of Liberty to ourselves. . . ."

It would indeed be a strange result to secure the blessings of life and liberty and freedom from fear of the government, only to surrender them to an unbridled and appreciable criminal segment which answers to no law except its own.

Respondent contends such was not the intent or purpose of the proscriptions of the Constitution. Respondent contends the purpose of this government was and is to secure life and liberty from the oppressive elements of both government officials and criminals.

Thus the Constitution provided for checks and balances and safeguards against tyranny by government while at the same time providing for a government with the means to capture, arrest, try and punish those criminals who would terrorize a community, criminally deprive a person of liberty, criminally deprive a person of life, or ravish the flower of our humanity . . . our women.

This Court has referred to the Preamble as evidence of the origin, scope and purpose of the Constitution.[27] With reference to the Preamble Alexander Hamilton observed in *The Continentalist* in 1781 that:

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26 *Downes v. Bidwell*, 182 U.S. 244, 251 (1901)
In re Ross, 140 U.S. 453, 464 (1891)
27 *McCulloch v. Maryland*, 4 Wheat (17 U.S.) 316, 403 (1819) (*Footnote 27 continued on page 26*)

> "In a government framed for durable liberty, not less regard must be paid to giving the magistrate a proper degree of authority to make and execute the laws with rigor, than to guard against encroachment upon the right of the community. As too much power leads to despotism, too little leads to anarchy, and both, eventually, to the ruin of the people."[28]

Justice Story in his *Commentaries* discussed the Preamble stating:

> Its true office is to expound the nature and extent and application of the powers actually conferred by the Constitution, and not substantively to create them. For example, the Preamble declares one object to be, 'to provide for the common defense.' No one can doubt that this does not enlarge the powers of Congress to pass any measures which they deem useful for the common defense. But suppose the terms of a given power admit of two constructions, the one more restrictive, the other more liberal, and each of them is consistent with the words, but is, and ought to be, governed by the intent of the power; if one could promote and the other defeat the common defense, ought not the former, upon the soundest principles of interpretation, to be adopted?"[29]

Respondent contends it is impossible to read either the Constitution of the United States as an entire instrument or the Constitution of North Carolina and believe the sovereign people have done anything but provide that one of the permissible punishments for murder or rape shall be death.

And while Respondent may concede that a Constitution is a "living" instrument which is constantly renewed and

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Chisholm v. Georgia, 2 Dall (2 U.S.) 419, 470-1 (1793) *Martin v. Hunter's Lessee*, 1 Wheat. (14 U.S.) 304 (1816)

28 Mason. FREE GOVERNMENT IN THE MAKING. 3d Ed. (1965) at p. 154

29 1 Story, *Commentaries on the Constitution*, §462

affirmed by the people, that is not to say this Court through its members, using this logic, is free to place *any* meaning upon it which the Justices desire from time to time.

For as Montesquieu, in THE SPIRIT OF LAWS, observed:

> "We must have continually present to our minds the difference between independence and liberty. Liberty is a right of doing whatever the laws permit, and if a citizen could do what they forbid, so would he no longer be possesed of liberty, because all his fellow citizens would have the same power . . . . (and) constant experience shows us, that every man invested with power is apt to abuse it; and to carry his authority as far as it will go. Is it not strange, though true, that virtue itself has need of limits?"[30]

Could future Justices of this Court through this "living instrument" logic and line of reasoning, decide the guaranty of a Republican form of government was out of step with some future set of conditions and construe another word or phrase in the Constitution in such a manner as to nullify that guarantee?

Unreasonable contentions regarding construction of the Constitution have been rejected by the Court as recently as the case of *United States v. Nixon*, _____ U.S. _____, 41 L.Ed. 2d 1039 (1974), where the President, under the claim of a Constitutional privilege would have, in effect, read out of the Constitution the power of the Congress to impeach.[31]

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30 Mason, FREE GOVERNMENT IN THE MAKING, 3rd Ed. 1965 at p. 45.

31 It is to be noted this power was not placed in the hands of the Judicial branch. Thus it should be assumed in matters of highest moment such as war, impeachment and declaring what conduct is criminal and the proper punishment therefore, the Sovereign has placed that power in their elected representatives, while placing in this Court's hands the power to assure this is a nation governed by law – not men nor might.
(Footnote 31 continued on page 28)

Nixon's claim was bottomed on "national security" which everyone would agree, we assume, is of vital and legitimate public interest. But it is not paramount to the other legitimate demands of society which had placed in the hands of the legislature the power and duty to remove from office a President who would violate the law he was sworn to uphold.

Without question, Petitioner requests this Court to construe the Eighth Amendment in such a manner as to nullify express provisions of the Fifth and Fourteenth Amendments, and to deny to the States the power to prescribe and impose appropriate punishment for capital crimes.

Petitioner thus requests this Court to nullify, in reality, the power of the people as a republic, acting through their elected representatives, to establish appropriate punishment for crime. Respondent contends that to do this, the Court would be placing an unwarranted restriction on Article IV of, and the Tenth Amendment to, the Constitution of the United States as well as nullifying express provisions of the Fifth and Fourteenth Amendments.

Respondent had thought the doctrine of nullification was dead. If it is not, perhaps the Petitioner will suggest to us how the States, one of the crucial branches of the Federal System, might go about nullifying express parts of the Constitution or Acts of Congress or judgments of Federal courts which a majority of the voters of a State might disagree with.

Yet, Petitioner boldly requests this Court to veto laws passed by some thirty state Legislatures and the Congress of the United States in complete disregard of express provisions

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Constitutional Amendments, it should be further noted, cannot be originated by either the Executive branch or the Judicial branch, but only by the Congress or the *States* (Article V, Constitution of the United States).

Can it ever be implied that the constitution grants this Court the power to amend the very Constitution itself by "interpretation" or "construction"? Respondent submits the answer is clearly "no." See *Ullman v. United States, supra.*, page 22, footnote 16.

of the Constitution. He requests the Court to read into the Constitution words and implications which admittedly are not there, and which were never intended to be there. In short, he requests this Court become a superlegislature and that this be done in the name of reform. Respondents response to that request is:

> "The Constitution of the United States provides ample opportunity for the expression of popular will to bring about such reforms and changes as the people may deem essential to their present and future welfare. It is the people's charter of the powers granted (to) those who govern them . . . . "[32]

The lawmakers and law enforcers have an affirmative constitutional duty to insure domestic tranquility. This is the office of the criminal justice system.[33] The limitations placed upon them by both the Federal and North Carolina Constitutions are that "cruel and unusual" punishment shall not be inflicted.[34] Neither life nor liberty shall be taken except by due process of law; nor shall any person be denied equal protection of the law.[35]

Operating within those limitations, it is the States' legislatures' inherent and exclusive duty and it has the correlative right to define crime and provide for the punishment of crimes committed.[36]

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32 Senate Reports, 75th Congress, 1st Session, 5 January--21 August 1937, Vol. I, Report No. 711, "Reorganization of the Federal Judiciary."

33 *Pound, III Jurisprudence*, Chapter 14, Interests, §92 at p. 264,(1959)

34 United States Constitution, Amendment VIII

35 United States Constitution, Amendments V and XIV

36 Article I, § § 19, 22 and 27, North Carolina Constitution
Ex parte United States, 242 U.S. 27 (1916)
State v. Brewer, 258 N.C. 533, 129 S.E.2d 262, (1963), appeal dismissed 375 U.S. 9 (1963)
Lawton v. Steele, 119 N.Y. 226, 23 N.E. 878 (1890), *aff'd.* 152 U.S. 133 (1894)

And it has been observed "The power is exclusive and it is not shared by the Courts. So long as constitutional prohibitions are not infringed, the will of the legislature in this respect is absolute."[37]

It is the duty of the executive to bring to justice those who commit crimes and the duty of the judiciary to assure the accused receives due process and equal protection of law.

Just as the Constitution of the United States contemplates capital punishment, so does the Constitution of North Carolina expressly provide therefor.[38]

And when an act of the legislature is called into question, this Court has previously observed:[39]

> "It is but a decent respect due the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favor of its validity until its violation of the Constitution is proved beyond all reasonable doubt."

This Court in *Furman* examined the history of the Eighth Amendment as set forth at pp. 26 - 40 of the Petitioner's brief, yet every member of the Court conceded that the meaning of the amendment is unclear, even construed in the light of history and the case law.

Mr. Justice Douglas wrote, 408 U.S. at p. 244:

> "But the debates of the First Congress on the Bill of Rights throw little light on its intended meaning."

Mr. Justice Brennan said, 408 U.S. at p. 258:

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37 21 Am. Jur. 2d Criminal Law §14, p. 95, citing among others, *Central Lumber Co. v. South Dakota*, 226 U.S. 157 (1912), *Coffey v. Harlan County*, 204 U.S. 659 (1907)

38 North Carolina Constitution, Article XI, §2.

39 *Ogden v. Saunders*, 12 Wheat. (25 U.S.) 213 (1824)

> "Almost a century ago, this Court observed that '(d)ifficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted.' . . . Those statements remain true today."

Mr. Justice White concluded, 408 U.S. at p. 313:

> "But, like my Brethren, I must arrive at judgment; and I can do no more than state a conclusion based on 10 years of almost daily exposure to the facts and circumstances of hundreds of federal and state criminal cases involving the crimes for which death is the authorized penalty."

Mr. Justice Marshall wrote, 408 U.S. at p. 315:

> The elasticity of the constitutional provision under consideration presents dangers of too little or too much self-restraint.

The Chief Justice said, 408 U.S. at p. 375:

> "There is no novelty in being called upon to interpret a constitutional provision that is less than self-defining, but, of all our fundamental guarantees, the ban on "cruel and unusual punishments" is one of the most difficult to translate into judicially manageable terms. The widely divergent views of the Amendment expressed in today's opinions reveal the haze that surrounds this constitutional command."

Mr. Justice Blackmun wrote, 408 U.S. at pp. 407-408:

> "The several concurring opinions acknowledge, as they must, that until today capital punishment was accepted and assumed as not unconstitutional *per se* under the Eighth Amendment or the Fourteenth Amendment. This is either the flat or the implicit holding of a unanimous Court in *Wilkerson v. Utah*, 99 U.S. 130, 134-135, in 1879; of a unanimous

Court in *In re Kemmler*, 136 U.S. 436, 447, in 1890; of the Court in *Weems v. United States*, 217 U.S. 349, in 1910; all of those members of the Court, a majority, who addressed the issue in *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463-464, 471-472, in 1947; of Mr. Chief Justice Warren, speaking for himself and three others (Justices Black, Douglas, and Whitaker) in *Trop v. Dulles*, 356 U.S. 86, 99, in 1958; in the denial of certiorari in *Rudolph v. Alabama*, 375 U.S. 889, in 1963 (where, however, Justices Douglas, Brennan, and Goldberg would have heard argument with respect to the imposition of the ultimate penalty on a convicted rapist who had "neither taken nor endangered human life"); and of Mr. Justice Black in *McGautha v. California*, 402 U.S. 183, 226, decided only last Term on May 3, 1971."

Finally, Mr. Justice Powell said, 408 U.S. at p. 419:

"The Eighth Amendment, adopted at the same time as the Fifth, proscribes "cruel and unusual" punishments. In an effort to discern its meaning, much has been written about its history in the opinions of this Court and elsewhere. That history need not be restated here since, whatever punishments the Framers of the Constitution may have intended to prohibit under the "cruel and unusual" language, there cannot be the slightest doubt that they intended no absolute bar on the Government's authority to impose the death penalty."

Given the general uncertainty of this Court as to the intention and meaning of the amendment caused by the lack of compelling historical evidence, is it proved here "beyond all reasonable doubt" that the act of the General Assembly providing a penalty of death for murder is unconstitutional?

The North Carolina Supreme Court in *State v. Waddell* unanimously had no doubt that capital punishment, *per se*, is constitutional. *See State v. Waddell*, 282 N.C. at 435, 194 S.E.2d at 22-23. The assumption of constitutionality of the

penalty is also apparent from Chief Justice Bobbitt's dissent. He made the grounds of his dissent clear, 282 N.C. at 453-454, 194 S.E.2d at 31:

> " . . . I do not think *any death sentence* may be constitutionally inflicted unless *our General Assembly* strikes from our present statutes the provisions which leave to the unbridled discretion of a jury whether the punishment shall be death or life imprisonment."

Justice Sharp, now Chief Justice, (a dissenter in *Waddell*) said, 282 N.C. at 476, 194 S.E.2d at 47:

> "In my view, there are no constitutional infirmities in capital punishment *per se* . . . ."

Accordingly, Respondent respectfully submits the answer to the first question should be answered "NO" in a decisive, unambiguous and authoritative decision.

III

IT IS AN INESCAPABLE FACT THAT APPROPRIATE PUBLIC OFFICIALS MUST EXERCISE THEIR HUMAN JUDGMENT BUT MUST DO SO IN GOOD FAITH AND ACCORDING TO LAW AND THEIR OATHS IN THE PERFORMANCE OF THEIR CONSTITUTIONAL DUTIES AT THE PROSECUTORIAL, VERDICT AND POST VERDICT STAGES IN THE ADMINISTRATION OF CRIMINAL JUSTICE IN NORTH CAROLINA. THAT FACT ALONE DOES NOT BRING RESPONDENT'S MANDATORY DEATH STATUTES WITHIN THE PROSCRIPTIONS OF THE *FURMAN* DECISION.

Respondent has previously set forth some of the numerous statutory limitations placed upon public officials in the performance of their official duties under the caption "Constitutional and Statutory Provisions Involved" and will not repeat them here except to note that every official of whom

Petitioner complains is a Constitutional Officer of North Carolina. This includes the Governor, the district attorneys, the judges and the jurors.

Each must take an oath to uphold the Constitution of the United States as well as the Constitution of North Carolina before entering upon the duties of office, and it is a criminal offense punishable by up to two years imprisonment to willfully or intentionally neglect to perform the duties of office according to law. (N.C.G.S. §14-230)

Respondent submits that its public officials act true to their oaths of office just as do the officers of this Court. Indeed, the presumption is that a public official in the performance of an official duty has acted in good faith and in accordance with the law and the authority conferred on him. A person asserting the contrary must overcome the presumption by competent evidence.[40]

This is so because, as this Court has recently observed:

> " . . . the ends of criminal justice would be defeated if judgments (of courts) were to be founded on a partial or speculative presentation of the facts."

No evidence has been presented here, or even attempted to be presented, which would warrant an inference that North Carolina has acted contrary to the extant law since *Furman*. Just as the justices of this Court must exercise their respective judgments on given cases which come before the Court, it is, at once, obvious that real and substantial constraints are placed upon them. First, there is the solemn oath of office required by Article VI, Clause 3 of the Constitution of the United States. Second, there are the tried and proven historical restraints of Anglo-Saxon jurisprudence (the Common Law) on actions by government officials. It is thus that precedents in legal history, which have been so long accepted, have become the sanctions of society as a whole. Respondent says these sanctions are the real guts of liberty. Third, there is the written Constitution. Fourth, there is the diffusion of the powers of government. Then fifth, there is the plural nature of the government of the United States wherein neither the federal government nor the States have the right to exercise the full general sovereign powers, so that all governments are limited and may be said to be "quasi-sovereign." The sixth is the answerability of government officials for their conduct in office to the criminal law. And seventh, there is the requirement of frequent elections whereby the conduct of public officials receives a thorough

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40 *Housing Authority of Wilson v. Wooten*, 257 N.C. 358, 126 S.E.2d 101 (1962)

41 *United States v. Nixon*, _____ U.S. _____ 41 L.Ed.2d 1039, 1064 (1974)

and on-going inspection by the sovereign people. Thus it is seen that, contrary to what petitioner suggests, public officials do not have independence to roam in an unfenced field nor do they have an unbridled discretion to act.

Judges have the constraints of written constitutions, legislative acts and the precedents of prior cases which set forth the limits within which they are to exercise their judgment. Jurors and prosecutors not only have the constraints of law but, additionally, have the constraint of competent *evidence* which sets forth limits within which they are to exercise their judgment.

This is illustrated by resort to a few of many cases so holding in Respondent's State Supreme Court.

The principle upon which a defendant may be convicted upon a less degree of the same crime charged in the bill of indictment applies *"only where there is evidence"* of guilt of the less degree, and where burglary in the first and second degree is charged in the indictment, and the question as to guilt on the first count is withdrawn, and *"the evidence does not support the charge"* of second degree burglary, the defendant cannot be convicted of the lesser offense.[42]

The principle in regard to conviction of a lesser degree of the crime charged in a bill of indictment applies *"only where there is some evidence"* that a less degree of the crime had been committed, and where the State's uncontradicted evidence is to effect that the crime of rape had been committed and the defendant relies solely upon an alibi, the refusal of the court to charge upon the lesser degrees of the crime or of an attempt is not error.[43]

"Where all the evidence at the trial" of a criminal action, if believed by the jury, tends to show that the crime charged in the indictment was committed as alleged therein, and there is no evidence tending to show the commission of a crime of less degree, the court should not instruct the jury that they

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42 *State v. Spain*, 201 N.C. 571, 160 S.E. 825 (1931)
43 *State v. Smith*, 201 N.C. 494, 160 S.E. 577 (1931)

may acquit the defendant of the crime charged in the indictment and convict him of a crime of less degree.[44]

A defendant may be convicted of a less degree of the crime charged, or for which he is being tried *"only when there is evidence to support the milder verdict."*[45] The jury does not have the arbitrary right or discretion to convict a defendant of a lesser degree of the crime charged or of a less serious offense than that charged *"where the uncontradicted evidence"* shows beyond a reasonable doubt that the defendant is guilty of the more serious offense charged in the bill of indictment.[46]

"Where all the evidence" tends to show that defendants feloniously took money from the person of prosecuting witness by violence and against his will through the use or threatened use of firearms, the court properly limits the jury to a verdict of guilty of robbery with firearms or a verdict of not guilty, *"there being no evidence"* warranting the court in submitting the question of defendants' guilt of less degrees of the crime.[47]

Where upon the trial for murder *"all the evidence tends to show"* that if the defendant is guilty, he is guilty of the crime of murder in the first degree, the failure of the trial court to charge upon the law of murder in the second degree or manslaughter is not error.[48]

"Where there is evidence to support a charge of murder and evidence to support the defendant's plea of homicide by misadventure, and also evidence of manslaughter," it is required that the "less degree of the same crime" be submitted to the jury with proper instructions.[49]

The extant situation then, is that government action must be taken upon decisions made. Decisions must be made upon judgment, and judgments must be made in good faith, upon oath, according to the law and evidence.

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44 *State v. Cox*, 201 N.C. 357, 160 S.E. 358 (1931)
45 *State v. Jordan*, 226 N.C. 155, 37 S.E. 2d 111 (1946)
46 *State v. Brown*, 227 N.C. 383, 42 S.E.2d 402 (1947)
47 *State v. Bell*, 228 N.C. 659, 46 S.E.2d 834 (1948)
48 *State v. Ferrell*, 205 N.C. 640, 172 S.E. 186 (1934)
49 *State v. Childress*, 228 N.C. 208, 45 S.E.2d 42 (1947)

The *judgment*[50] then which public officials must exercise (and only that which they *may* exercise) in the performance of their constitutional *duties* is an animal different in kind, rather than degree, from the *discretion*[51] which petitioner alleges Respondent's officials possess.

Respondent has examined and reexamined this Court's *Furman* decision and fails to find any support therein for the proposition advanced by Petitioner here that the *mere existence* of the power in public officials to make judgments results, *ipso facto*, in the imposition of death sentences which were proscribed by *Furman*.

Respondent reads *Furman* as standing for a single and limited proposition, to wit: where an unbridled discretion in sentencing authority exists (whether by judge or jury) to impose either a death sentence or a life sentence upon felons convicted of equal degrees of crime, then because of the manner (arbitrarily, capriciously and discriminatorily) in which those having such power have applied it in the past, such discretion violated the Constitution of the United States, and those sentenced to death pursuant to such an arbitrary power could not be executed.

The republican response to that decision has been to remove that unbridled discretionary power from judges and juries, and in North Carolina, all those convicted of an equal degree of the crimes of first degree murder or rape "shall suffer death."

Respondent having cured the constitutional defects in its administration of capital punishment which were found to exist in *Furman*, submits the answer to Petitioner's second question should be "NO" and the decision below should be affirmed.

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50 "judgment, n. 3. the ability to judge, make a decision or form an opinion *objectively, authoritatively*, and *wisely*." (Emphasis added), RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 772 (1966)

51 "discretion, n. 1. the power or right to decide or act according to *one's own judgment; freedom of judgment or choice* . . . ." (Emphasis added). *Id.* at 411.

IV

PETITIONER'S CHARGE THAT TRIAL BY JURY FOR A CAPITAL CRIME VIOLATES THE EIGHTH AMENDMENT TO THE CONSTITUTION IS A *NON-SEQUITUR*.

Petitioner's complaints (Petitioner's Brief pp. 62-95) regarding trial by jury admittedly leaves respondent's counsel somewhat adrift in preparing a response.

Where the State's legislatures had previously attempted to grant an admitted capital felon a right to save his own life by his guilty plea, this Court found that violated the Sixth Amendment's guarantee of trial by jury.[52]

To accept Petitioner's contention, one would have to embrace the *non-sequitur* that by enabling defendant to enjoy the guarantees afforded by the Fifth and Sixth Amendments the State necessarily violates the Eighth. A strange concept indeed.

V

STATES ARE CONSTITUTIONALLY PERMITTED TO CHOOSE AMONG ALTERNATIVE METHODS OF ACHIEVING THE ENDS OF CRIMINAL JUSTICE.

The Petitioner states in his Brief at pp. 121-122:

> "Criminal punishments are traditionally justified by five related but separable objectives: reformation and rehabilitation, moral reinforcement or reprobation, isolation or specific deterrence, retribution, and deterrence."

With this we agree. The General Assembly of this State has found, by providing for the death penalty, that capital punishment acts as moral reinforcement or reprobation by

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52 *United States v. Jackson*, 390 U.S. 570 (1968) and cases reversed on its authority in 403 U.S. 948 (1970)

exemplar to others; that it is the final and complete isolation of the offender which the security of the people ultimately requires; that the death penalty satisfies the need for social retribution; and that it acts as a deterrent.[53]

The requirement of the Constitution is not that the method *most effective* to the achievement of a permissible end be chosen, but that the means chosen not be inconsistent with and bear a rational relationship to the achievement of a permissible goal. The judgment of the General Assembly that capital punishment serves more nearly to achieve the permissible goals of criminal justice than life imprisonment is certainly not irrational, nor is it inconsistent with the legitimate and permissible aims it attempts to achieve. The selection of the *best method* is a legislative and not a judicial task. Petitioner's argument that life imprisonment better serves the aims of criminal justice is appropriately addressed to the General Assembly or to the people. It raises no justiciable issue.

In North Carolina, the court said "What constitutes cruel or unusual punishment . . . is not subject to expert (or other) opinion evidence."[54] Even so, Petitioner's citations to the opinions of those opposed to capital punishment seem to have exhausted the Index to Legal Periodicals on that subject.

Petitioner cites statistics and draws inferences therefrom that capital punishment is no deterrent to the commission of capital crimes. Respondent submits the following statistics[55] and contends one can, at least with equal certainty, draw an inference that capital punishment is a deterrent.

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53 The opinions of this Court in *Furman* demonstrate that the evidence on whether capital punishment, as an objectively determinable fact, acts as a deterrent, is at best, inconclusive. This question, like almost all of the questions relating to capital punishment is ultimately one to be determined by judgment rather than art. The ones to make that judgment are the delegate of the the people.

54 *State v. Rogers*, 275 N.C. 411, 168 S.E.2d 346 (1969)

55 Ben R. Miller, Chairman of the A.B.A. Section of Criminal Justice said in Volume 2, No. 3, Fall 1974 of the *Criminal Justice Bulletin* at page 3:
(*Footnote 55 continued on page 41*)

It is significant to Respondent that while the British Parliament was considering reinstating capital punishment for terrorist activities, the IRA got the "Christmas spirit" and declared a moratorium on their bombing activities and following the close parliamentary vote, the IRA now seems to be extending the moratorium.

As the shadow of the gallows grows nigh they seem to have lost their zeal for their merciless killing.

> "Contrary to many assertions that the possibility of apprehension, conviction and infliction of a death penalty cannot be 'proven' to be a strong deterrent, I submit that the F.B.I. Uniform Crime Reports for the years since 1960 conclusively substantiate the death penalty as a deterrent. There were 56 executions in 1960, 42 in 1961, 47 in 1962. In 1963 - as the movement to abolish and question the constitutionality of the death penalty gained momentum - there were but 21. Between 1963 and 1967, murder increased a dramatic 32%. In the same period, aggravated assault jumped over 43% and forcible rape 48%.
>
> One can only surmise that by the mid-sixties, the criminal element of our society, particularly the potential rapist and murderer, knew that there was a nationwide moratorium on the death penalty. In fact, the last execution was in 1967. In the ensuing five-year period, the rate for murder jumped 46%, aggravated assault 45%, and forcible rape 62%. To one who has practiced law over forty-five years, these 'statistics' were not necessary to establish that the death penalty for forcible rape was a very strong deterrent to the commission of that crime."

VI

CONTEMPORARY STANDARDS OF ONE OR MORE STATES OR THE FEDERAL GOVERNMENT CANNOT BE THE BASIS FOR ABROGATING RIGHTS OF OTHER STATES RESERVED TO THEM BY THE TENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The State of North Carolina is one of the crucial essential elements of a diffused system of allocation of governmental powers. As such, it has duties to perform in providing for the safety and welfare of its citizens which no other agency may perform. It is a republican form of government and in the exercise of its constitutional role, and performance of its duties, it must have the correlative rights commensurate with the duties placed upon it.

This Court only recently had to resort to first principles of Constitutional government in *United States v. Richard M. Nixon*, _____ U.S. _____, 41 L.Ed.2d 1039 (1974) and said:

> "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.
>
> "Notwithstanding the deference each branch must accord the others, the 'judicial power of the United States' vested in the federal courts by Article III, §1 of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government. The *Federalist*, No. 47, p. 313.

> "In designing the structure of our Government and dividing and allocating the sovereign power among three coequal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence. 'While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence; autonomy but reciprocity.'"

This Court noted that unreasonable Constitutional claims can "upset the constitutional balance of a workable government." (41 L.Ed.2d at 1063)

While the Court in *Nixon* was addressing itself to allocating the limited sovereign power it has between the three branches of the federal government, the same considerations apply with equal vigor to the federal -- state relationship.

Under the regime of Constitutional law as established in the United States, the separation of powers and checks and balances as a means to maintain liberty went further than separating only the three branches of the federal government. The constitutional scheme places heavy reliance upon the independence and sovereignty of the States. A.T. Mason, *Free Government in the Making*, 3d Ed. Oxford University Press (1965) at pages 140 and 141 observed:

> "John Adams (was) certainly among the best-informed men in the country on political science . . . (and) . . . Toward the end of his life Adams could take satisfaction in noting that the federal system followed his basic principle to an extraordinary degree, including, as he saw it, no less than eight balances: (1) states and territories against the central government; (2) the House of Representatives against the Senate; (3) the President against Congress; (4) the Judiciary against Congress; (5) the Senate against the President in matters of appointments and treaties; (6) the people against

their Representatives; (7) the state legislatures against the Senate; (8) the Electoral College against the people."

Scott, *Sovereign States and Suits*, (1925) at pages 55-57 observes:

> "Without laboring the matter further, it is abundantly clear that the States after the Declaration of 1776 were free, sovereign and independent, and they remained so, in the sense of international law, until they changed that status by their subsequent, and, as we shall see, voluntary act."

When the States changed their status with respect to the new government of the United States they did not surrender their sovereignty. The States granted certain of their powers to the United States and as Hamilton states in *The Federalist* (No. 45), "The Powers delegated by the proposed Constitution to the federal government are few and defined."

The proposition that the federal government is one of limited powers is so fundamental and so apparent that it needs little elaboration. As stated by Chief Justice Marshall in *McCulloch v. Maryland*, 17 U.S. 316 (1819):

> "This government is acknowledged by all to be one of enumerated powers. . . . We admit, as all must admit, that the powers of the (federal) government are limited, and that its limits are not to be transcended."

Justice Story, in *Martin v. Hunter's Lessee*, 14 U.S. 303, 325 (1816), said:

> "The government, then of the United States, can claim no powers which are not granted to it by the Constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication."

There, then can be no dispute that the federal government has no powers beyond those delegated to it in the

Constitution. That is, it has only limited sovereignty.

This being so, then where does the remainder of the sovereign power lie? If the answer be "the people" then who has "the people" deemed should exercise the remaining powers of their sovereignty?

The State contends the answer is to be found in the tenth amendment to the Constitution, i.e., to the States, as previously stated in another context.

Roscoe Pound in Volume II, *Jurisprudence*, at page 317 *et. seq.* states:

> "As a legal conception, sovereignty seems to mean the aggregate of powers possessed by the ruler or ruling organs of a politically organized society. Internal sovereignty, then, is the aggregate of the powers of internal control possessed by the ruling organs of the society by virtue of which it is paramount over all action within. It is the capacity of making, declaring and amending the law . . . without reference to any other authority and without any legal limit to its own power. . . . . At common law, social interests were largely secured by a doctrine that the king was *parens patriae*, father of his country. That is, he was the guardian of public and social interests of all kinds and hence his courts of law and of equity had a general superintendence of all matters where "public rights" (i.e. social interests or public interests) might be jeopardized."

In Volume III, *Jurisprudence*, 264, Pound states:

> "Criminal law is the primary resource of the legal order for securing social interests immediately as such."

Pound further discusses *Interests* in Volume III, *Jurisprudence* at page 238, *et. seq*. He specifically discusses the interests of the state (in the international sense) as a legal entity.

> "*Interests of the state as a juristic person.* No small part of international law is taken up with the interests of states which international law should secure against infringement by other states. Thus it has usually been said that the absolute or natural rights of states, meaning the interests which it is held should be secured, are: (1) The right of self preservation and independence. This is analogous to the so-called natural rights of physical integrity and personal liberty ascribed to the individual. It is analogous to an individual interest of personality. (and) (2) The right of exclusive legislation and jurisdiction within its territory. This, too, is an interest of personality. It is an interest akin to the interest of the individual in being allowed to manage his own affairs freely. *Juristically, it is secured as a liberty.* . . . . "

As the tenth amendment is directed toward maintaining the class of interests referred to by Pound as "public interests," *id.* (Vol. III at page 235), this Court of the United States is equally obligated to protect the State of North Carolina's exercise of its retained sovereign rights as it is to protect any other constitutionally protected right whether it be individual or State.

This Court, even if it desired to do so, could no more abrogate a Constitutionally retained right of a State than it could a right of an individual. Thus "contemporary standards" of other states cannot be a proper basis for abolishing the death penalty under the Eighth Amendment any more than the "contemporary standards" of the McCarthy era could abolish the rights guaranteed to the individual under the Fifth Amendment to the Constitution.

Only by the exercise of the sovereign power of the State through its legislature may the punishment for murder or rape be lessened in North Carolina. Constitutionally, it is not intended that any other agency of government exercise that power unless it be by the people of North Carolina by vote on a constitutional amendment, this being the essence of a republican form of government.

VII

THE BLADE OF "MISTAKE" IS DOUBLE EDGED.

Petitioner's repetitive references to Professor Black's article regarding the possibility of mistake cuts like a sword. The prospect of the government making a mistake in its judgment thereby causing an innocent person to die is awesome and painful indeed. But the sword is double edged.

To illustrate, when the State exercised its judgment to expend its primary effort in the direction of humaneness, rehabilitation and confinement in the case of Henry Jarrette (See Appendix B, pp. 8b-10b) it erred. As a result of that error two innocent citizens fell victim to Jarrette's depravity. Gwendolyn Blackmon, a 16 year old black girl, was raped and David Timothy Parker's life was taken in a most vicious manner without benefit of law or clergy.

Respondent's government is of this earth and man. It is not blessed with omniscience and is incapable of transcendentalism. But it has placed every safeguard known to it to avoid the possibility of making the kind of mistake referred to by Petitioner.

It cannot, in any event, be said that Respondent has made a mistake in Petitioner's case. It is clear by all the evidence as well as his own admission that he killed John Griffin.

Respondent's system of checks to prevent mistakes from occurring which might otherwise cause it to execute an innocent person apparently works well. Indeed, not a single instance in the two hundred year history of capital punishment in North Carolina has been cited to this Court where Respondent has executed an innocent man or is even suspected of doing so.

The errors which have resulted in the loss of *innocent* life are those where the State has released a killer or rapist upon society only to have him kill or rape the innocent again.

Thus the government must take man as it finds him – capable of greatness on the one hand and depravity on the other. Its laws must allow for both characteristics and they do.

To the citizen who accepts Respondent's standards of decency and civilized conduct, and lives accordingly, opportunity to achieve greatness is open at every turn and redress for injury to him is granted as an absolute right.[56]

To the citizen who rejects Respondent's standards and embarks upon the most depraved course of conduct known to man, Respondent says to him that he must "suffer death" at its hands and it thus dispatches his soul on its way to take his case to a higher authority.

VIII

RESPONDENT'S STANDARDS OF DECENCY AND CIVILIZED BEHAVIOR ARE EXPRESSED IN ITS MOTTO *ESSE QUAM VIDERI* "TO BE RATHER THAN TO SEEM."

Petitioner finds fault with the civilized standards of decency and morality adopted by Respondent in the course of conducting the business of government.

Respondent's standards of governmental conduct is *justice according to law* and are second to none in this nation.

To illustrate, when the policy of the nation ran contrary to the law of Respondent in the matter of race relations, Respondent yielded. No federal troops, no U.S. marshals and no mounted police were ever necessary to enforce the new policy in North Carolina. Respondent's school system, for example, is now the most racially integrated in the nation. "Today, North Carolina has the most completely desegrated school system in the nation according to the latest statistics from the U. S. Department of Health, Education and Welfare."[57]

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56 Article I, §18, North Carolina Constitution, *supra*. page 3

57 Davis, *N. C. School Integration: 20 Years Later*, The News and Observer, May 12, 1974.

Thus it is seen that Respondent's motto *Esse Quam Videri* is more than rhetoric – it is reality.

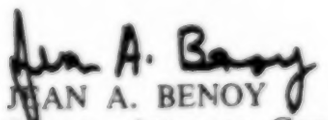
CONCLUSION

Petitioner's appeal to the virtue of this Court is a siren song, for the Petitioner's argument is bottomed upon the proposition that only the members of this Court are to be trusted with the ultimate determination of what is right, moral, decent and civilized in America. While it may be flattering, it is seen at once that the sovereign people trust no single man or body of men to make those judgments save themselves.

Accordingly, it is respectfully submitted that in contrast to Petitioner's impressive emotional appeal (more appropriately addressed to a State Legislature for legislative action or to the sovereign for constitutional amendment), the Respondent has addressed itself to the sole permissible basis for disposition of the present issues – the United States Constitution. Thus while Petitioner's argument might otherwise be moving, it must be subordinate to the unemotional criteria by which the law of our country must be construed as well as applied. Needless to say, official decisions tainted by emotional bias, regardless by whom made, subvert the spirit as weil as the letter of our laws. The Respondent thus contends that in the clear light of the Constitution, the decision of the Supreme Court of North Carolina must be affirmed.

Respectfully submitted,

RUFUS L. EDMISTEN
Attorney General



JEAN A. BENOY
Deputy Attorney General

NOEL LEE ALLEN
Associate Attorney

DAVID S. CRUMP
Associate Attorney

Post Office Box 629
Raleigh, North Carolina 27602
Telephone: (919) 829-3786

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that I am admitted to practice law before the Supreme Court of the United States; and that I have served copies of the Respondent's Brief by depositing three copies of same to Counselors for the Petitioner properly addressed to Jack Greenberg, 10 Columbus Circle, New York, New York, 10019; Anthony G. Amsterdam, Stanford University Law School, Stanford, California 94305; and Adam Stein, Chambers, Stein, Ferguson & Lanning, 157 East Rosemary Street, Chapel Hill, North Carolina 27514; and depositing same in the United States Post Office at Raleigh, North Carolina, with first class postage affixed.

This the 3rd day of February, 1975.

JEAN A. BENOY
Deputy Attorney General

COUNSEL FOR THE STATE OF NORTH CAROLINA, RESPONDENT

APPENDIX A

State v. Waddell

In Full Text

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL SESSION 1972

STATE OF NORTH CAROLINA v. JAMES HOWARD WADDELL

No. 5

(Filed 18 January 1973)

STATE OF NORTH CAROLINA v. JAMES HOWARD WADDELL

No. 5

(Filed 18 January 1973)

1. Constitutional Law § 36; Criminal Law § 135— death penalty — discretion of jury — unconstitutionality

Under the decision of *Furman v. Georgia*, 408 U.S. 238, the death sentence may not be inflicted if either judge or jury is permitted to impose that sentence as a matter of discretion.

2. Constitutional Law § 36; Criminal Law §§ 120, 135; Rape § 7— rape— jury discretion to recommend life imprisonment — unconstitutionality — mandatory death sentence

The decision of *Furman v. Georgia*, 408 U.S. 238, invalidated the proviso of G.S. 14-21 giving the jury the discretion to recommend and thus fix the punishment for rape at life imprisonment; however, the invalid proviso is severable from the remainder of the statute, leaving death as the mandatory punishment for rape in North Carolina.

3. Criminal Law §§ 120, 135— capital case — instructions to jury — mandatory death sentence

Upon the trial of any defendant charged with rape, murder in the first degree, arson or burglary in the first degree, the trial court may not instruct the jury that it may in its discretion add to its verdict of guilty a recommendation that defendant be sentenced to life imprisonment, but the court should charge on the constituent elements of the offense set out in the bill of indictment and instruct the jury under what circumstances a verdict of guilty or not guilty should be returned; upon the return of a verdict of guilty of any such offense, the court must pronounce a sentence of death. G.S. 14-17; G.S. 14-21; G.S. 14-52; G.S. 14-58.

4. Constitutional Law § 35— ex post facto clause — applicability to judiciary — increase in punishment

While the letter of the *ex post facto* clause is addressed to legislative action, the constitutional ban against the retroactive increase of punishment for crime applies as well against judicial action having the same effect.

5. Constitutional Law § 35; Criminal Law § 135— mandatory death penalty — prospective effect of decision

Since a judicial decision in effect changing the penalty for rape or other capital crimes from death or life imprisonment in the discretion of the jury to mandatory death would be *ex post facto* as to such offenses committed prior to the change, North Carolina's mandatory death penalty for rape, murder in the first degree, burglary in the first degree and arson may not be constitutionally applied to any offense committed prior to 18 January 1973, the date of this decision. Art. I, § 16, N. C. Constitution; Art. I, § 10, U. S. Constitution.

Justice HIGGINS concurring in result.

Justice LAKE concurring.

Chief Justice BOBBITT concurring in part and dissenting in part.

Justice SHARP concurring in the opinion of Chief Justice BOBBITT.

DEFENDANT appeals from judgment of *Blount, J.*, December 1971 Session, SAMPSON Superior Court.

Defendant was tried on a bill of indictment, proper in form, charging him with the rape of Mrs. Thelma Jackson on the 8th day of June 1971.

The State's evidence tends to show that when Mrs. Thelma Jackson returned from work about 6 p.m. on 8 June 1971 she unlocked the back door and entered her home. She found a black man standing behind a chair in her living room. He had a stocking over his face and a butcher knife in his pocket. He placed Mrs. Jackson in a chair, tied her hands together with a small cord, and told her he would kill her if she made a noise. Then, using the same cord, he tied her ankles together. She screamed when a neighbor passed on a tractor, and he placed the knife to her neck and threatened to cut her throat.

The intruder then placed Mrs. Jackson on the couch, sat beside her, and said: "I know all about you. I know your husband has been dead about four and a half or five years and you never had any children and you live alone and I know about you." After several minutes of conversation with Mrs. Jackson, he pulled her up from the couch and walked her to the bedroom. This operation took about ten minutes since her feet were still tied. He sat her down in a reclining chair in the bedroom, unzipped her dress in the back, untied her hands, and stripped all her clothing down to the waist. He then tied her hands again, untied her feet and completely undressed her. He then stuffed a large roll of cotton in her mouth but removed it when it appeared she was unable to breathe. He ripped a pillowcase into strips, tying one strip over her mouth and blindfolding her with another. He then placed her on the bed and raped her.

While Mrs. Jackson was still blindfolded, her assailant removed her from the bed, put her clothing back on her, bound her legs together again, and sat her in a chair. He then moved about the house, apparently gathering foodstuffs and other items. In response to Mrs. Jackson's inquiry after he had made several trips to the kitchen, he stated he was doing "what I

have to do." He finally left about 7:30 p.m., having been in Mrs. Jackson's presence about an hour and a half, the last thirty minutes of which she was blindfolded. She had observed and talked with him for one hour while he was in her home.

Mrs. Jackson was bleeding badly from her privates and needed medical attention. She eventually worked her hands free, removed her blindfold, untied her feet, and sought help at the home of a black family who lived across the road. Deputy Sheriff Chase arrived within ten minutes after being called.

Items missing from Mrs. Jackson's home included an old pair of Knapp shoes belonging to her deceased husband (S-3), a small teaspoon (S-10), and a roll of adhesive tape. When apprehended, defendant was wearing the shoes and had the spoon and a roll of Johnson & Johnson Adhesive Tape in a little leather case. At the preliminary hearing and in court at the trial, Mrs. Jackson stated that she recognized defendant by his build, "his looks and all of it," and said she would recognize his voice if she ever heard it again. She positively identified defendant as the man who raped her.

After interviewing Mrs. Jackson the night of the rape, officers began an investigation of the crime scene, checking for fingerprints and footprints. Fingerprints were lifted from the windowsill where defendant had entered the house, from the front of the medicine cabinet mirror in the kitchen of the Jackson residence, from the first drawer of the chest of drawers in Mrs. Jackson's bedroom where defendant had obtained the pillowcases he ripped up, from inside the medicine cabinet door, and from a kitchen cabinet. All these fingerprints were later compared by an expert with ink impressions of defendant's fingerprints and in the opinion of the expert were identical.

A set of footprints led from Mrs. Jackson's home to a point in the woods at the base of a pine tree about one hundred fifty yards away where the officers found a pile of articles, including a lady's stocking, a piece of cord, an empty pear can, a pair of brown gloves, a pair of lady's panties and two pieces of a torn pillowcase. Many of these items were identified as having come from Mrs. Jackson's home.

While officers were searching for Mrs. Jackson's assailant, Bruce Jackson, a former highway patrolman, saw defendant in the woods eight to ten miles from Mrs. Jackson's home. Although many officers were in the area searching, Bruce Jackson was

alone at the time. He spoke to defendant who said his name was Jackson; that he worked for the Town of Dunn and "they had sent him down there to help capture that man that had messed that white woman about." When asked for some identification, defendant grabbed Bruce Jackson's shotgun and the two men tusseled over it for ten or fifteen minutes. Defendant kept repeating, "I am the one that you are looking [for] but you ain't going to tell anybody because I am going to kill you right here and now." During the tussle Mr. Jackson succeeded in firing the shotgun and thus attracted the attention of other officers in the woods. They converged on the scene and took defendant into custody.

Defendant offered no evidence. At the close of the State's evidence his motion for judgment of nonsuit was denied. The jury returned a verdict of guilty of rape as charged in the bill of indictment. Defendant's motion to set the verdict aside was denied and defendant was sentenced to death. He appealed to the Supreme Court assigning as error the denial of his motions and further contending that the death penalty constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States.

David J. Turlington, Jr., Attorney for defendant appellant.

Robert Morgan, Attorney General, and Jean A. Benoy, Deputy Attorney General, for the State of North Carolina.

HUSKINS, Justice.

We overrule defendant's assignments of error based on denial of his motions for nonsuit and to set aside the verdict. The evidence is overwhelmingly sufficient to carry the case to the jury and to support the verdict. Likewise, defendant's third assignment addressed to the charge has no merit and cannot be sustained. The court's charge on circumstantial evidence is free from prejudicial error. We therefore put aside these assignments without discussion and go directly to the constitutional question raised by defendant and argued in the briefs.

Defendant contends that the imposition and carrying out of the death penalty was held in *Furman v. Georgia*, 408 U.S. 238, 33 L.Ed. 2d 346, 92 S.Ct 2726 (1972), to constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The State, on the other hand, disputes

defendant's interpretation of the holding in *Furman* and argues that the death sentence was lawfully and constitutionally imposed in this case and should be carried out. These antagonistic positions require an analysis of the *Furman* decision.

Furman v. Georgia was consolidated with *Jackson v. Georgia* and *Branch v. Texas* for decision. Each defendant was black. Furman killed a Georgia householder while seeking to enter the home at night. Jackson entered a Georgia home after the husband left for work, held scissors against the neck of the wife and raped her. Branch entered the Texas home of a 65-year-old widow, a white woman, while she slept and raped her, holding his arm against her throat. Furman was convicted of murder, Jackson and Branch of rape, and each was sentenced to death after a trial by jury which, under applicable Georgia and Texas statutes, had discretionary authority to determine whether to impose the death penalty. On certiorari, the United States Supreme Court reversed the judgment in each case insofar as it left undisturbed the death sentence imposed, and the cases were remanded for further proceedings. In an opinion expressing the views of five members of the Court, it was held that the imposition and carrying out of the death sentence in the three cases before the Court constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. Four members of the Court dissented, voting to sustain the constitutionality of the statutes under which defendants were tried and sentence of death imposed.

Prior to the decision in *Furman v. Georgia, supra*, the United States Supreme Court implicitly approved or, albeit in dictum, expressly upheld the constitutionality of capital punishment in many cases, including *Wilkerson v. Utah*, 99 U.S. 130, 25 L.Ed. 345 (1879); *In re Kemmler*, 136 U.S. 436, 34 L.Ed. 519, 10 S.Ct. 930 (1890); *Weems v. United States*, 217 U.S. 349, 54 L.Ed. 793, 30 S.Ct. 544 (1910); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 91 L.Ed. 422, 67 S.Ct. 374 (1947); *Trop v. Dulles*, 356 U.S. 86, 2 L.Ed. 2d 630, 78 S.Ct. 590 (1958); *Witherspoon v. Illinois*, 391 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct. 1770 (1968); *McGautha v. California*, 402 U.S. 183, 28 L.Ed. 2d 711, 91 S.Ct. 1454 (1971). Thus, since the ratification of the Eighth Amendment one hundred eighty-one years ago, no decision of the United States Supreme Court prior to *Furman* casts the slightest doubt on the constitutionality of capital punishment. Therefore, since the decision in *Furman* is not grounded on prior decisions of the Court, the scope of

that holding must be gleamed from the separate opinions of the Justices themselves.

The nine opinions focus upon the Eighth Amendment which provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The proscription of cruel and unusual punishments is applicable to the States through the Due Process Clause of the Fourteenth Amendment. *Powell v. Texas*, 392 U.S. 514, 20 L.Ed. 2d 1254, 88 S.Ct. 2145 (1968); *Robinson v. California*, 370 U.S. 660, 8 L.Ed. 2d 758, 82 S.Ct. 1417 (1962).

We note at the outset that only two members of the Court, Mr. Justice Brennan and Mr. Justice Marshall, concluded that capital punishment for all crimes under all circumstances is prohibited by the Eighth Amendment. Mr. Justice Brennan summarized his views in these words:

> "At bottom, then, the Cruel and Unusual Punishments Clause prohibits the infliction of uncivilized and inhuman punishment. . . . The test, then, will ordinarily be a cumulative one: If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes. . . . Under these principles and this test, death is today a 'cruel and unusual' punishment."

Mr. Justice Marshall reached a like conclusion when he wrote:

> "There is but one conclusion that can be drawn from all of this—*i.e.*, the death penalty is an excessive and unnecessary punishment which violates the Eighth Amendment. . . . In addition, even if capital punishment is not excessive, it nonetheless violates the Eighth Amendment because it is morally unacceptable to the people of the United States at thi time in their history."

Thus, it may be seen that these two Justices joined in the *Furman* decision on the basis that capital punishment is *per se* unconstitutional.

Mr. Justice Douglas rested his concurrence on a different basis. He wrote:

> "In these three cases the death penalty was imposed, one of them for murder, and two for rape. In each *the determination of whether the penalty should be death or a lighter punishment was left by the State to the discretion of the judge or of the jury.* In each of the three cases the trial was to a jury. [Emphasis added] . . . In a nation committed to Equal Protection of the laws there is no permissible 'caste' aspect of law enforcement. Yet we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, poor and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position. . . . Thus, these discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination. . . . Any law which is nondiscriminatory on its face may be applied in such a way as to violate the Equal Protection Clause of the Fourteenth Amendment. *Yick Wo v. Hopkins*, 118 U.S. 356. Such conceivably might be the fate of a mandatory death penalty, where equal or lesser sentences were imposed on the elite, a harsher one on the minorities or members of the lower castes. *Whether a mandatory death penalty would otherwise be constitutional is a question I do not reach.*" (Emphasis added.)

It seems clear that Mr. Justice Douglas left open the question of the constitutionality of a mandatory death penalty and voted to invalidate the death sentence in *Furman* and companion cases on the ground that the trial jury was given statutory discretion as to whether a defendant convicted of rape or murder should be sentenced to death or to life imprisonment.

Mr. Justice Stewart joined the majority opinion on similar grounds: That under the Georgia and Texas statutes, the death penalty was not mandatory for murder and rape but could be imposed in the unfettered discretion of trial juries, and that the exercise of this discretion resulted in "freakish" selection of those who should be executed for their crimes. He expressed his views as follows:

> "[A]t least two of my Brothers have concluded that the infliction of the death penalty is constitutionally im-

permissible in all circumstances under the Eighth and Fourteenth Amendments. Their case is a strong one. *But I find it unnecessary to reach the ultimate question they would decide.* [Emphasis added] . . . The constitutionality of capital punishment in the abstract is not, however, before us in these cases. For the Georgia and Texas Legislatures have not provided that the death penalty shall be imposed upon all those who are found guilty of forcible rape. And the Georgia Legislature has not ordained that death shall be the automatic punishment for murder. . . . These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. . . . I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."

Mr. Justice White concurred in the majority opinion for reasons substantially similar to those of Justice Stewart. The following language from his concurring opinion depicts his views:

"In joining the Court's judgments, therefore, I do not at all intimate that the death penalty is unconstitutional *per se* or that there is no system of capital punishment that would comport with the Eighth Amendment. . . . I cannot avoid the conclusion that as the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice. . . . That conclusion, as I have said, is that the death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not. The short of it is that the policy of vesting sentencing authority primarily in juries . . . has so effectively achieved its aims that capital punishment within the confines of the statutes now before us has for all practical purposes run its course."

Four members of the Court dissented and voted to uphold the constitutionality of the Georgia and Texas statutes under which Furman, Jackson and Branch were tried and sentenced to death. The position of the four dissenters is best summed up by Chief Justice Burger as follows:

"There are no obvious indications that capital punishment offends the conscience of society to such a degree that our traditional deference to the legislative judgment must be abandoned. . . . Capital punishment is authorized by statute in 40 States, the District of Columbia and in the federal courts for the commission of certain crimes. On four occasions in the last eleven years Congress has added to the list of federal crimes punishable by death. In looking for reliable indicia of contemporary attitude, none more trustworthy has been advanced. . . . Today the Court has not ruled that capital punishment is *per se* violative of the Eighth Amendment; nor has it ruled that the punishment is barred for any particular class or classes of crimes. The substantially similar concurring opinions of Mr. Justice Stewart and Mr. Justice White, which are necessary to support the judgment setting aside petitioners' sentences, stop short of reaching the ultimate question. . . . The critical factor in the concurring opinions of both Mr. Justice Stewart and Mr. Justice White is the infrequency with which the penalty is imposed. This factor is taken not as evidence of society's abhorrence of capital punishment . . . but as the earmark of a deteriorated system of sentencing. It is concluded that petitioners' sentences must be set aside, not because the punishment is impermissibly cruel, but because juries and judges have failed to exercise their sentencing discretion in acceptable fashion."

[1] The foregoing quotations from the various separate opinions in *Furman* compel the conclusion that capital punishment has not been declared unconstitutional *per se*. Rather, the *Furman* decision holds that the Eighth and Fourteenth Amendments will no longer tolerate the infliction of the death sentence if either judge or jury is permitted to impose that sentence as a matter of discretion.

[2] We now consider the effect of the *Furman* decision on G.S. 14-21 which reads as follows:

"Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or

more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death: *Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury.*" (Emphasis added)

Does *Furman* invalidate G.S. 14-21 in its entirety or invalidate only the discretionary proviso, leaving death as the mandatory punishment for rape in North Carolina? A look at history is necessary to put the question in proper perspective.

Blackstone's Commentaries tell us:

"Rape was punished by the Saxon laws . . . with death . . . . But this was afterwards thought too hard: and in its stead another severe, but not capital, punishment was inflicted by William the conquerer; *viz*, castration and loss of eyes; which continued till after Bracton wrote, in the reign of Henry the third. * * *

"In the 3 Edw. I. [1275] by the statute Westm. 1. c. 13. the punishment of rape was much mitigated: the offence itself being reduced to a trespass, if not prosecuted by the woman within forty days, and subjecting the offender only to two years imprisonment, and a fine at the king's will. But, this lenity being productive of the most terrible consequences, it was in ten years afterwards, 13 Edw. I. found necessary to make the offence of rape felony, by statute Westm. 2. c. 34. And by statute 18 Eliz. c. 7. it is made felony without benefit of clergy . . . . " 4 W. Blackstone, Commentaries, 211-2 (1st ed. 1769).

In 1778, the State of North Carolina enacted what is now G.S. 4-1 which states:

"All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State."

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By this statute the common law death penalty for rape was adopted in North Carolina. This punishment was codified in Vol. 1, c. 34, § 5 of the 1837 Revised Statutes of North Carolina.

In 1869, the General Assembly of North Carolina reenacted the punishment for rape in the following language:

"Every person who is convicted, in due course of law, of ravishing and carnally knowing any female of the age of ten years or more by force and against her will; or who is convicted, in like manner, of unlawfully and carnally knowing and abusing any female child under the age of ten years, shall suffer death." Public Laws of 1868-69, c. 167, § 2.

An amendment in 1917 raised the age of consent from ten to twelve years. See Public Laws 1917, c. 29.

Thus, death has been the punishment for rape in North Carolina for almost two hundred years. Our present statute on the subject, G.S. 14-21, was amended in 1949 by adding the proviso which (1) empowers the jury in its discretion to recommend and thus to fix the punishment at life imprisonment, and (2) requires the trial judge to so instruct the jury. Session Laws of 1949, c. 299, § 4.

Since the 1949 amendment adding the proviso, seventeen bills or resolutions have been introduced in the General Assembly of North Carolina designed to abolish or limit the imposition of the death penalty for rape or other capital offenses. See House Bills 924, 925, 927 and 928 in the 1955 Session: House Bill 113 in the 1961 Session: House Bill 35, Senate Bill 27 and Senate Resolution 173 in the 1963 Session; House Bills 103 and 351 in the 1965 Session: House Bills 68, 71, 138 and 314 in the 1967 Session: House Bill 160 in the 1969 Session; and House Bill 397 and Senate Bill 251 in the 1971 Session. All of these bills and resolutions failed to receive a favorable report from the committee to which referred, or were tabled or defeated on the floor of the House in which introduced.

The new State Constitution, which was ratified by the people in the general election of 1970, retained the provision contained in the former Constitution of North Carolina authorizing the General Assembly to provide by statute for the imposition of the death penalty for murder, arson, burglary and rape. See Constitution of North Carolina, Article XI, Sec-

tion 2. Thus, there is nothing in the legislative or constitutional history of this State to indicate an intent by the Legislature, or by the people, to reduce the punishment for rape from death to life imprisonment, or to indicate that the 1949 proviso was enacted for that purpose except upon the discretionary recommendation of the jury, or to indicate that such proviso would have been enacted at all had its unconstitutionality been foreseen by the 1949 General Assembly. Rather, such history demonstrates a constant intent by the people and their representatives to retain the death penalty for murder, arson, burglary and rape notwithstanding the proviso added in 1949.

It is the proviso, and the proviso alone, which creates the discretionary difficulty condemned by the *Furman* decision; and it is quite clear that *Furman* strikes down the proviso as violative of the Eighth and Fourteenth Amendments.

The question then arises: Does the remainder of G.S. 14-21 stand alone with death as the mandatory punishment for rape? Or, is the proviso such a constituent and inherent part of a single statutory scheme of punishment that it is inseverable and the entire statute must fall?

In 16 Am. Jur. 2d, Constitutional Law, § 186, the rule of severability is thus stated:

> "If the objectionable parts of a statute are severable from the rest in such a way that the legislature would be presumed to have enacted the valid portion without the invalid, the failure of the latter will not necessarily render the entire statute invalid, but the statute may be enforced as to those portions of it which are constitutional. If, however, the constitutional and the unconstitutional portions are so dependent on each other as to warrant the belief that the legislature intended them to take effect in their entirety, it follows that if the whole cannot be carried into effect, it will be presumed that the legislature would not have passed the residue independently, and accordingly, the entire statute is invalid."

The original portion of G.S. 14-21 with its mandatory death penalty for rape stood alone and was given full effect by the courts of this State for a century prior to the enactment of the 1949 proviso. Grammatically, as well as historically, the two portions of the statute are distinct and separate and the con-

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stitutional invalidity of the added portion will not destroy the part which was in existence prior to the enactment of the unconstitutional portion.

"Usually, when an amendatory exception to a statute proves unconstitutional, the original statute stands wholly unaffected by it." 16 Am. Jur. 2d, Constitutional Law, § 184. "When exceptions, exemptions, or provisos in a statute are found to be invalid, the entire act may be void on the theory that by striking out the invalid exception the act has been widened in its scope and therefore cannot properly represent the legislative intent. *This result is not reached, however, when the repugnant exception was added by way of amendment,* as it may be said that the Legislature did intend, at least originally, to pass the act without offering the exception." (Emphasis added) Sutherland, Statutes and Statutory Construction, § 2412 (3d ed. 1943).

In *Frost v. Corporation Commission,* 278 U.S. 515, 73 L.Ed. 483, 49 S.Ct. 235 (1929), the United States Supreme Court dealt with an Oklahoma statute which, as originally enacted, required a certificate of public convenience and necessity in order to engage in the business of operating a cotton gin. The statute was thereafter amended to insert a proviso exempting gins operated by cooperatives. The Court held the proviso violated the Equal Protection Clause of the Fourteenth Amendment but upheld the statute as initially written, saying:

> "Here it is conceded that the statute, before the amendment, was entirely valid. When passed, it expressed the will of the legislature which enacted it. Without an express repeal, a different legislature undertook to create an exception, but, since that body sought to express its will by an amendment which, being unconstitutional, is a nullity and, therefore, powerless to work any change in the existing statute, *that statute must stand as the only valid expression of the legislative intent.*" (Emphasis added)

In *United States v. Jackson,* 390 U.S. 570, 20 L.Ed. 2d 138, 88 S.Ct. 1209 (1968), the Supreme Court of the United States held invalid a proviso in the Federal Kidnapping Act (18 U.S.C. § 1201(a)) providing for the death sentence upon conviction of kidnapping under certain circumstances if the jury so recommended in its verdict. Originally, the statute made the crime punishable by imprisonment only. The Court held that

the remainder of the statute was valid since the unconstitutional proviso was severable from it, saying:

> "As we said in *Champlin Rfg. Co. v. Commission*, 286 U.S. 210, 234: 'The unconstitutionality of a part of an Act does not necessarily defeat . . . the validity of its remaining provisions. Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.'
>
> "Under this test, it is clear that the clause authorizing capital punishment is severable from the remainder of the kidnapping statute and that the unconstitutionality of that clause does not require the defeat of the law as a whole."

The fact that the proviso in G.S. 14-21 gives the jury the discretion to recommend life imprisonment rather than death does not distinguish the case before us from *United States v. Jackson, supra.*

In *Bank v. Lacy*, 188 N.C. 25, 123 S.E. 475 (1924), this Court said: "The invalidity of one part of a statute does not nullify the remainder when the parts are separable and the invalid part was not the consideration or inducement for the Legislature to enact the part that is valid." To like effect: *Jackson v. Board of Adjustment*, 275 N.C. 155, 166 S.E. 2d 78 (1969); *Clark v. Meyland*, 261 N.C. 140, 134 S.E. 2d 168 (1964); *Fox v. Commissioners of Durham*, 244 N.C. 497, 94 S.E. 2d 482 (1956); *Power Co. v. Clay County*, 213 N.C. 698, 197 S.E. 603 (1938); *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540, 46 L.Ed. 679, 22 S.Ct. 431 (1902).

It is the proviso which confers upon juries the discretion to send one defendant to death and another to prison for life for the same crime committed under substantially similar circumstances. This, and only this, is what *Furman* condemns as violative of the Eighth and Fourteenth Amendments. The proviso, then, can no longer be given effect as part of the law of North Carolina. This leaves in effect the original statute making the death sentence mandatory upon a conviction of rape, and forbids an instruction to the jury that it may, in its discretion, fix a different punishment.

In light of the authorities cited, we hold that the unconstitutional proviso in G.S. 14-21 is severable and the remainder

of the statute with death as the mandatory punishment for rape remains in full force and effect. A similar conclusion was reached by the Supreme Court of Delaware in *State v. Dickerson*, ... Del. ....., ... A. 2d ....., 12 Cr. L. 2145 (decided 1 November 1972).

[3] We recognize that the Legislature, not the courts, decides public policy, responds to public opinion and, by legislative enactment, reflects society's standards. The matter of retention, modification or abolition of the death penalty is a question for the law-making authorities rather than the courts. In view of the decision in *Furman*, the Legislature may wish to delete the unconstitutional proviso from G.S. 14-21 (rape), G.S. 14-17 (murder), G.S. 14-52 (burglary), and G.S. 14-58 (arson); or it may wish to rewrite these statutes altogether to give expression to what it conceives to be the public will. Meanwhile, we hold that the effect of the *Furman* decision upon the law of North Carolina concerning the punishment for rape, murder in the first degree, arson and burglary in the first degree is this: Upon the trial of any defendant so charged, the trial judge may not instruct the jury that it may in its discretion add to its verdict of guilty a recommendation that defendant be sentenced to life imprisonment. The trial judge should charge on the constitutent elements of the offense set out in the bill of indictment and instruct the jury under what circumstances a verdict of guilty or not guilty should be returned. Upon the return of a verdict of guilty of any such offense, the court must pronounce a sentence of death. The punishment to be imposed for these capital felonies is no longer a discretionary question for the jury and therefore no longer a proper subject for an instruction by the judge.

Since the invalid proviso in G.S. 14-21 was given effect from the time it was enacted in 1949 to the date of the *Furman* decision in all cases wherein the defendant was convicted of rape or other capital crimes under the statutes applicable thereto, the practical effect of a judicial determination that the proviso is severable and therefore eliminated from the statute is to change the penalty for rape (or other capital crimes) from *death or life imprisonment in the discretion of the jury* to *mandatory death*. An upward change of penalty by legislative action cannot constitutionally be applied retroactively. Article I, section 16 of the Constitution of North Carolina forbids the enactment of any *ex post facto* law. The Federal Constitution contains a like prohibition against *ex post facto* enactments

by a state. See Constitution of the United States, Art. I, sec. 10. It has been held that this section of the Constitution "forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer. * * * It hardly could be thought that, if a punishment for murder of life imprisonment or death were changed to death alone, the latter penalty could be applied to homicide committed before the change." *Lindsey v. Washington,* 301 U.S. 397, 81 L.Ed. 1182, 57 S.Ct. 797 (1937). It thus appears that where the punishment at the time of the offense was death or life imprisonment in the discretion of the jury, as in the case before us, a change by the Legislature to death alone would be *ex post facto* as to such offenses committed prior to the change. *State v. Broadway,* 157 N.C. 598, 72 S.E. 987 (1911).

[4] While we recognize that that the letter of the *ex post facto* clause is addressed to legislative action, the constitutional ban against the retroactive increase of punishment for a crime applies as well against judicial action having the same effect. "[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids. An *ex post facto* law has been defined by this Court as one 'that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action' or 'that aggravates *a crime,* or makes it *greater* than it was, when committed.' [Citation omitted] If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." *Bouie v. Columbia,* 378 U.S. 347, 12 L.Ed. 2d 894, 84 S.Ct. 1697 (1964).

[5] For the reasons stated, we hold that North Carolina's mandatory death penalty for rape, murder in the first degree, burglary in the first degree and arson may not be constitutionally applied to any offense committed prior to the date of this decision but shall be applied to any offense committed after such date. *Compare, Johnson v. New Jersey,* 384 U.S. 719, 16 L.Ed. 2d 882, 86 S.Ct. 1772 (1966).

We now turn to the task of applying the *Furman* decision, and the holding here, to the death sentence imposed upon defendant in this case.

Defendant was tried, convicted and sentenced under G.S. 14-21, and the trial judge instructed the jury, *inter alia,* as follows: "If you return a verdict of guilty of rape, you may accompany your verdict with a recommendation of life imprisonment. If you make no such recommendation, the law provides that the defendant will be put to death in the gas chamber. If you do so recommend, the punishment will be imprisonment for life. You are completely free to accompany a verdict of guilty with a recommendation of life imprisonment or not, as the law leaves that to your complete and unbridled discretion. Thus members of the jury, depending on how you find the facts, there are three possible verdicts which you may return, you may find the defendant guilty of rape with no recommendation; guilty of rape with a recommendation of life imprisonment or not guilty." Thus, the jury was permitted to exercise its discretion and choose between death and life imprisonment. The proviso in G.S. 14-21 requiring the judge to so charge and permitting the jury in its discretion to so choose is not materially different from the discretion vested in the jury by the Georgia and Texas statutes condemned by *Furman.* It is apparent, therefore, that *Furman* forbids the imposition of the death penalty in this case. This conclusion is buttressed by the fact that, following the decision in *Furman,* five cases in which we had affirmed the imposition of the death sentence were remanded to this Court by the Supreme Court of the United States "for further proceedings," the judgment of this Court having been vacated "insofar as it leaves undisturbed the death penalty imposed." We remanded those cases to the respective superior courts for imposition of sentences of life imprisonment. *State v. Miller,* 281 N.C. 740, 190 S.E. 2d 841 (1972); *State v. Hamby and Chandler,* 281 N.C. 743, 191 S.E. 2d 66 (1972); *State v. Chance,* 281 N.C. 746, 191 S.E. 2d 65 (1972); *State v. Westbrook,* 281 N.C. 748, 191 S.E. 2d 68 (1972); *State v. Doss,* 281 N.C. 751, 191 S.E. 2d 70 (1972).

Accordingly, the judgment of the Superior Court of Sampson County insofar as it imposed the death penalty upon this defendant is reversed. The case is remanded to the Superior Court of Sampson County with directions to proceed as follows:

1. The presiding judge of the Superior Court of Sampson County will cause to be served on the defendant, James Howard Waddell, and on his counsel of record, notice to appear during a session of said Superior Court at a designated time, not less

than ten days from the date of the notice, at which time, in open court, the defendant, James Howard Waddell, being present in person and being represented by his counsel, the presiding judge, based on the verdict of guilty of rape returned by the jury at the trial of this case at the December 1971 Session, will pronounce judgment that the defendant, James Howard Waddell, be imprisoned for life in the State's prison.

2. The presiding judge of the Superior Court of Sampson County will issue a writ of habeas corpus to the official having custody of the defendant, James Howard Waddell, to produce him in open court at the time and for the purpose of being present when the judgment imposing life imprisonment is pronounced.

REMANDED FOR JUDGMENT.

Justice HIGGINS concurring in result.

A Court opinion must reflect the views of the majority of the Court. A concurring in result opinion may reflect the individual views of the writer.

In my opinion, *Furman v. Georgia*, 408 U.S. 238, 33 L.Ed. 2d 346, does not work any change in North Carolina trial procedure. The decision deals with punishment only. Hence in what are now our four capital felonies the trial court should, as in other cases, omit any reference to punishment and charge on the constitutent elements of the offenses and instruct the jury under what circumstances a verdict of guilty should be returned. As a result of the Court's holding in Furman, a charge on the right of the jury to recommend life imprisonment is now an idle gesture and should be omitted. The recommendation is not authorized until the jury unequivocally finds guilt. A conviction without a jury recommendation now requires life imprisonment and permits nothing more.

After discussing the effect of the 1949 amendment giving the jury power to recommend life imprisonment in our four capital felony cases, the majority opinion concludes: "It is the proviso, and the proviso alone, which creates the discretionary difficulty condemned by the Furman decision; and it is quite clear that Furman strikes down the proviso as violative of the Eighth and Fourteenth Amendments."

I do not so interpret the effect of Furman. That decision does not strike down the proviso and does not hold that it

violates the Eighth and Fourteenth Amendments. Furman holds that after the jury determines guilt and the State law permits either the court or the jury discretion whether the punishment shall be death or life imprisonment, life imprisonment must be imposed. Where discretion is given, Furman holds that a life sentence is valid but strikes down the death penalty. The rationale of the rule seems to be that if discretion between a death sentence or life imprisonment is given either to the court or the jury, the milder punishment must be imposed because in the interpretation of criminal statutes that which is the more favorable to the accused must be accepted.

The fixing of punishment for crime is a legislative function. The General Assembly, in my view, may fix death as the punishment for either or all of the four offenses named in Article XI, Section 2 of the North Carolina Constitution. The Legislature may provide the death penalty or it may provide life imprisonment, but when it undertakes to give an option, the milder judgment must be imposed.

In my opinion, this Court can no more strike out the proviso for life imprisonment than it can strike out the death penalty. Both provisions were inserted in the law by the General Assembly. I am unfamiliar with any authority this Court has to legislate on the subject by repealing either provision.

This further objection to the opinion: After the Court has "eliminated" the right of the jury to recommend life imprisonment in this case, the Court further decrees that capital punishment shall be restored after this Court's opinion is handed down. This holding seems to be required in order that the Court may dig itself out of the hole it fell into by its holding that Furman "strikes down the proviso as violative of the Eighth and Fourteenth Amendments." Furman, as I understand it, holds that life imprisonment is valid, but because of the option, Furman strikes down the death penalty.

Since writing the above I have read the well documented opinion of the Chief Justice. I fully concur therein.

Justice LAKE concurring.

I concur in all parts of the opinion of Justice Huskins. In view of the length of the dissenting portion of the opinion of the Chief Justice and of the number of authorities cited therein,

and because of the importance of the issue, I deem it advisable to state, as briefly as possible, why I do not find its argument persuasive or the citations convincing upon the question with which the opinion of Justice Huskins deals.

The jury having returned a verdict of guilty of rape without making a recommendation that the defendant's punishment be life imprisonment, a sentence to death was imposed by the trial court pursuant to G.S. 14-21. It is, therefore, our duty to determine the effect now to be given that statute by the courts of North Carolina. We may not properly bypass that task, nor escape our responsibility for it by labeling the question one of policy for determination by the Legislature.

The Supreme Court of the United States being the higher authority on the validity of judgments under the Constitution of the United States, its mandates, issued in reliance upon *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346, vacating the death sentences previously affirmed by this Court in the five cases cited in the opinion of Justice Huskins, became the law of those five cases. Under the compulsion of those mandates, this Court remanded those cases to the respective superior courts for the imposition of sentences of life imprisonment.

The present case, on the contrary, is before us for the first time. In it we have no mandate from the Supreme Court of the United States vacating the death sentence imposed upon this defendant. In the absence thereof, it is our duty, not that of the Legislature, to determine just what the United States Supreme Court decided in *Furman v. Georgia, supra*, and to determine the present state of the law of North Carolina with reference to punishment for the crime of rape in the light of that decision.

Only this Court can determine whether any portion of G.S. 14-21 is the law of North Carolina today and, if so, which portion. The Legislature, now in session, cannot make that determination. The Legislature can determine what the law of this State ought to be and shall be in the future. That is policy making and that is the Legislature's prerogative and responsibility. It is for us, and for us alone, to determine what part of G.S. 14-21, if any, is the law of North Carolina today and determinative of the validity of the sentence from which this defendant appeals. That is not policy making but the interpre-

tation of the statute—an exercise of the judicial function which we may not abdicate or assign to the Legislature. Constitution of North Carolina, Art. I, § 6; Art. IV, § 1.

It is quite clear, as the opinion of Justice Huskins plainly states, that it is for the Legislature, not for this Court, to determine the policy of this State as to what acts shall be deemed crimes and as to the punishment therefor; that is, to determine what punishment ought to be and shall be imposed for the offense of rape hereafter committed. Constitution of North Carolina, Art. I, § 6; Art. II, § 1; Art. XI, § 2. But the Legislature has spoken in G.S. 14-21 and, until it speaks again, it is the duty of this Court to determine what, if anything, remains of its pronouncement in G.S. 14-21 after the decision in *Furman v. Georgia, supra*. No officer or agency, save this Court, can make that determination.

The determination of that question as stated in the opinion of Justice Huskins is, in my view, unassailably correct. If the Legislature, now sitting, deems the result of our determination is unwise, as a matter of policy, it may, as to rapes hereafter committed, adopt and promulgate a different rule as to punishment. That is its responsibility, not ours.

The opinion of the Chief Justice states:

> "If *Furman* had decided that the portion of G.S. 14-21 quoted above was separable and invalid and that death is now the sole and exclusive punishment for rape, such decision would apply to all rapes committed subsequent to 29 June 1972, the date *Furman* was decided. But this was not the decision in *Furman*."

Of course, it was not, for the simple reason, if for none other, that the Supreme Court of the United States does not have the authority to decide that question. Whether a statute is separable or inseparable is a question of statutory interpretation. It is well settled that the interpretation of a state statute is a question to be determined by the supreme court of the state. The Supreme Court of the United States has repeatedly accepted as binding upon it the interpretation placed upon state statutes by the highest courts of such states.

Thus, the Supreme Court of the United States has not said, and may not properly determine that G.S. 14-21 is or is not separable. What it has said in *Furman v. Georgia, supra*, is that

the discretion which the proviso in G.S. 14-21 undertook to vest in North Carolina juries cannot be conferred upon them consistently with the Fourteenth Amendment. It having so held, it is now the prerogative and duty of this Court, and this Court alone, to determine whether the proviso is severable from the original statute unto which the proviso was attached by amendment in 1949. Thus, it is the date of the decision of that question by this Court—today—not the date of the decision in *Furman v. Georgia, supra,* which fixes the offenses of rape for which a death sentence may be imposed without running afoul of the Ex Post Facto principle.

The opinion of the Chief Justice further states:

> "*Furman* simply held that *the death penalty provision* of G.S. 14-21 as now constituted was invalid and that, absent amendment, no death sentence can be constitutionally imposed and carried out."

I do not find the words, "absent amendment," in any of the nine opinions by the justices in *Furman v. Georgia, supra,* nor in the per curiam statement of the decision therein. *Furman v. Georgia, supra,* did not hold "the death penalty provision of G.S. 14-21" invalid. It held, as the opinion of Justice Huskins states, that the death penalty cannot be imposed *at a time when juries or judges are given the discretion to impose the death penalty on one defendant and life imprisonment on another for the same offense*—quite a different thing.

I am unable to agree with the reasoning by which the Chief Justice reaches the conclusion that the defeat in 1971 of the legislative proposal to abolish the death penalty for rape and make life imprisonment the mandatory punishment therefor now compels us to hold that, since *Furman v. Georgia supra,* life imprisonment has become the mandatory punishment for the crime. Quite obviously, the 1971 Legislature preferred, as a matter of policy, to leave North Carolina juries in possession of the discretion which the 1949 amendment to G.S. 14-21 attempted to give them. It seems to me perfectly clear that the 1971 Legislature did not believe the then prophecy that the United States Supreme Court would decide as it did in *Furman v. Georgia, supra.* As the opinions of the four dissenting justices in *Furman v. Georgia, supra,* show, the earlier decisions of the Court afforded ample basis for such legislative disbelief. However, in any event, the Chief Justice's opinion, if adopted by

this Court, would result in our declaring G.S. 14-21 now to mean precisely what the 1971 Legislature expressly refused to make it say. This we may not do. The Legislature of 1971 obviously wanted the whole of G.S. 14-21, including the proviso, which it believed constitutionally permissible, but this is far from showing it wanted the whole or nothing. It certainly fails to show that, if unable to have the whole, it wanted the part which it refused to adopt, standing alone, in preference to the part which it refused to repeal.

The array of decisions from other states, cited in the opinion of the Chief Justice, are simply in point on the question of the severability of G.S. 14-21. In the first place, substantially all of them, if not all, held only that the death penalty may not be imposed by a state in a case which arose and was adjudicated while the state undertook to give its juries the discretion which *Furman v. Georgia, supra,* held cannot be vested in juries. In so holding these decisions do not conflict with the opinion of Justice Huskins. In the second place, of all the cited decisions only those from Mississippi and Florida appear to contain any discussion of the question of the severability of the various state statutes involved and the Mississippi and Florida decisions appear to rest on the acceptance by those courts of the view that their statutes were severable and the life sentence provisions therein were the parts which survived the decision in *Furman v. Georgia, supra.* In the third place, decisions from other states as to the severability of their statutes cannot help us materially in determining whether our own statute is severable, even if the wording of the statutes be identical, because the legislative history of the respective statutes may well be quite different. As the opinion of Justice Huskins demonstrates, the history of G.S. 14-21 leads to the conclusion that the proviso, added by the amendment of 1949, is severable from the remainder of the statute.

It is one thing to hold, as the Mississippi and Florida Courts appear to have done, that a statute like G.S. 14-21 is severable and the part which survives *Furman v. Georgia, supra,* is that providing for a life sentence. This would, as Justice Huskins has demonstrated, simply be a most strained and improbable view of the intent of the North Carolina Legislature in the light of its repeated refusals to abolish capital punishment. It is a far different thing to say, as the opinion of the Chief Justice suggests, that G.S. 14-21 is an inseparable whole.

If this view suggested in the opinion of the Chief Justice were correct, it would necessarily follow that the imposition of a sentence to imprisonment for life would be unlawful. It is well settled, as shown by the authorities cited by Justice Huskins, that if the provisions of a statute are, indeed, so interrelated that they are an inseparable whole, the statute cannot be partly unconstitutional and partly constitutional. Quite obviously, the effect of *Furman v. Georgia, supra,* is that G.S. 14-21 is not, in its entirety, constitutional. If it be inseparable, then the entire statute would fall under the impact of *Furman v. Georgia, supra,* and G.S. 14-21 would authorize no sentence whatever. In that event, rape being a felony at common law and no specific punishment being provided by a valid statute, G.S. 14-2 would apply and the maximum sentence for rape would be imprisonment for ten years plus a fine.

Of course, the real thrust of the opinion of the Chief Justice is not that G.S. 14-21 is inseparable but that it is separable and that the proviso is the surviving portion. This I find inconsistent with the legislative history of the statute, correctly set forth by Justice Huskins.

Chief Justice BOBBITT concurring in part and *dissenting* in part.

I agree with the majority's conclusion that "the *Furman* decision [*Furman v. Georgia,* 408 U.S. 238, 33 L.Ed. 2d 346, 92 S.Ct. 2726 (1972)] holds that the Eighth and Fourteenth Amendments will no longer tolerate the infliction of the death sentence if either judge or jury is permitted to impose that sentence as a matter of discretion." Under North Carolina statutes, whether the punishment for first degree murder, or rape, or burglary in the first degree, or arson, is to be death or life imprisonment depends solely on how the jury exercises its unbridled discretion.

Prior to *Furman,* this Court had sustained the convictions and death sentences in *State v. Miller,* 276 N.C. 681, 174 S.E. 2d 481 (1970); *State v. Hamby and Chandler,* 276 N.C. 674, 174 S.E. 2d 385 (1970); *State v. Chance,* 279 N.C. 643, 185 S.E. 2d 227 (1971); *State v. Westbrook,* 279 N.C. 18, 181 S.E. 2d 572 (1971); and *State v. Doss,* 279 N.C. 413, 183 S.E. 2d 671 (1971). On authority of *Furman,* the Supreme Court of the United States vacated the judgment(s) in each of these cases "insofar as it [left] undisturbed the death penalty imposed,"

and remanded the case to this Court for further proceedings. *Miller v. North Carolina,* 408 U.S. 937, 33 L.Ed. 2d 755, 92 S.Ct. 2863 (1972); *Hamby and Chandler v. North Carolina,* 408 U.S. 937, 33 L.Ed. 2d 754, 92 S.Ct. 2862 (1972); *Chance v. North Carolina,* 408 U.S. 940, 33 L.Ed. 2d 764, 92 S.Ct. 2878 (1972); *Westbrook v. North Carolina,* 408 U.S. 939, 33 L.Ed. 2d 761, 92 S.Ct. 2873 (1972); *Doss v. North Carolina,* 408 U.S. 939, 33 L.Ed. 2d 762, 92 S.Ct. 2875 (1972). Thereupon, this Court remanded each of these cases to the superior court which had tried it with direction that judgments imposing a sentence of life imprisonment be pronounced. *State v. Miller,* 281 N.C. 740, 190 S.E. 2d 841 (1972); *State v. Hamby and Chandler,* 281 N.C. 743, 191 S.E. 2d 66 (1972); *State v. Chance,* 281 N.C. 746, 191 S.E. 2d 65 (1972); *State v. Westbrook,* 281 N.C. 748, 191 S.E. 2d 68 (1972); *State v. Doss,* 281 N.C. 751, 191 S.E. 2d 70 (1972).

The decision on this appeal is that *Furman* requires that this Court vacate the death sentence and remand *this case* to the superior court for the pronouncement of judgment imposing a life sentence. I emphatically agree with this decision. Moreover, I do not think *any death sentence* may be constitutionally inflicted unless *our General Assembly* strikes from our present statutes the provisions which leave to the unbridled discretion of a jury whether the punishment shall be death or life imprisonment. In my opinion, this Court has no right to ignore, delete or repeal these provisions, which were put there by the General Assembly as an integral part of its plan for the punishment of crimes for which the death sentence was permissible. *Furman* did not repeal them. This Court has no right to repeal them.

While unnecessary to the disposition of this appeal, the majority opinion states the views of four members of this Court with reference to the conduct of trials and the sentencing of defendants in the future for crimes of murder in the first degree, rape, burglary in the first degree and arson *committed subsequent to the present decision.* Since the decision in *Furman,* several cases have been tried in our superior courts in which the defendants were convicted and sentenced to life imprisonment when the jury returned verdicts of guilty (no recommendation as to punishment being involved) and at least two cases in which upon a like verdict the defendant received a death sentence. My dissent is not directed to the fact that the majority are giving an advisory opinion or directive to our superior

court judges with reference to crimes committed *subsequent to Furman*. Although the appeals in these cases will come to us in due course, I agree that our superior court judges are *now* entitled to some directive from this Court. *The ground on which I dissent is that the majority are giving what I consider to be the wrong advisory opinion or directive.*

The views expressed in the majority opinion *to which I dissent* may be summarized as follows: The *Furman* decision invalidates the portion of G.S. 14-21 which reads: "Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury." The invalidation of this provision leaves intact that portion of the statute which precedes it and provides for punishment by death. The *Furman* decision does not invalidate the death penalty under present North Carolina statutes. It makes death the sole and exclusive punishment for rape. However, the death penalty is not to be imposed and carried out except for crimes committed subsequent to the filing of *this* decision.

If *Furman* had decided that the portion of G.S. 14-21 quoted above was separable and invalid and that death is now the sole and exclusive punishment for rape, such decision would apply to all rapes committed subsequent to 29 June 1972, the date *Furman* was decided. But this was *not* the decision in *Furman*. *Furman* simply held that *the death penalty provision* of G.S. 14-21 as now constituted was invalid and that, absent amendment, no death sentence can be constitutionally imposed and carried out. The dismemberment of G.S. 14-21, and the declaration that death is the sole and exclusive punishment for rape, are neither required nor warranted by the decision in *Furman*.

Under Article XI, §§ 1 and 2, of the Constitution of North Carolina, the General Assembly is authorized to provide that the crimes of murder, rape, burglary and arson, and these only, may be punishable by death. Pursuant thereto, the General Assembly has enacted statutes which provide that a person convicted of first degree murder, G.S. 14-17, or of rape, G.S. 14-21, or of first degree burglary, G.S. 14-52, or of arson, G.S. 14-58, shall suffer death *unless* the jury, at the time of rendering its verdict in open court, recommends that the defendant's punishment shall be imprisonment for life in the State's prison.

There has been no change in any of the provisions of G.S. 14-17, G.S. 14-21, G.S. 14-52, and G.S. 14-58, since the enactment of Chapter 299, Session Laws of 1949, which contains the following: "Sec. 4. Section 14-21 of the General Statutes of North Carolina is hereby *rewritten* so as to read as follows:

"Sec. 14-21. Punishment for rape. Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death: *Provided*, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury." (Our italics.)

Sections 14-17, 14-52 and 14-58 of the General Statutes were rewritten by sections 1, 2 and 3 of Chapter 299, Session Laws of 1949. As rewritten they prescribed in like manner the punishment for murder in the first degree, burglary in the first degree and arson, respectively.

Our General Assembly has provided that no death sentence can be pronounced unless (1) the jury is instructed that the mandatory punishment will be death unless the jury when returning its verdict in open court recommends that the punishment be imprisonment for life in the State's prison, and unless (2) notwithstanding such instruction the jury returns a verdict of guilty and does not recommend that the punishment be imprisonment for life in the State's prison. Subsequent to the enactment of the 1949 Act, whether the punishment for murder in the first degree, or for rape, or burglary in the first degree, or for arson was to be death or life imprisonment was to be determined by juries, case by case, rather than by law applicable to all who committed crimes bearing those names. This Court consistently held that no constitutional right of a defendant was violated by provisions which authorized the jury, upon finding a defendant guilty of murder in the first degree, or of rape, or of burglary in the first degree or of arson, to determine whether the punishment was to be death or imprisonment for life, notwithstanding the absence from the statute of any standards to guide the jury in making that determination.

Notwithstanding our decisions upholding G.S. 14-17, G.S. 14-21, G.S. 14-52 and G.S. 14-58, the possibility that the Supreme Court of the United States would render a decision substantially

like the decision in *Furman* had been anticipated. In the report submitted by the Judicial Council for consideration by the General Assembly of 1969, attention was called to this possibility. *If the General Assembly wished to continue the death penalty for the crime of rape,* it was recommended that G.S. 14-21 be amended by *striking the following:* "Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's Prison, and the court shall so instruct the jury." Similar recommendations were made with reference to G.S. 14-17 (first degree murder), G.S. 14-52 (first degree burglary) and G.S. 14-58 (arson). To implement these recommendations, bills were prepared and introduced. H.B. No. 136 (relating to rape, first degree burglary and arson), and H.B. No. 137 (relating to murder in the first degree), were referred to Judiciary Committee No. 2 of the House. Both received unfavorable reports. The General Assembly, although advised that the provision for the imposition of a death sentence might be held invalid, refused to prescribe death as the punishment for rape without providing for the alternative of life imprisonment if the jury so recommended.

H.B. No. 397 was introduced in the General Assembly of 1971. Section 2 thereof provided: "Sec. 2. G.S. 14-21 is hereby amended by striking the following words: 'shall suffer death: Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison.', and by inserting in lieu thereof the following words: 'shall suffer punishment by imprisonment for life in the State's prison.'" Sections 1, 3 and 4 of H.B. No. 397 provided for the amendment in like manner of the provisions of G.S. 14-17, G.S. 14-52 and G.S. 14-58 relating to punishment for murder in the first degree, burglary in the first degree and arson. H.B. No. 397 was referred to and (as amended) reported favorably by Judiciary Committee No. 2 but failed to pass the House on second reading.

The reasonable inference from the foregoing is that the General Assembly wanted G.S. 14-17, G.S. 14-21, G.S. 14-52 and G.S. 14-58 to remain exactly as they had been since 1949 and as upheld by the decisions *of this Court.* All provisions of G.S. 14-21 relate to the single subject indicated by the caption, to wit, "Punishment for rape." The provisions thereof constitute a single legislative plan. Only the *death penalty provision* was invalidated by *Furman.*

It is the decision of a majority of this Court—not the decision in *Furman*—which dismembers G.S. 14-21 and declares a particular portion thereof invalid and undertakes—in direct conflict with *Furman*—to validate the death penalty provision of G.S. 14-21 and adjudge that under present statutes death is the sole and exclusive punishment for rape. The main thrust of *Furman* is to restrict the circumstances in which capital punishment may be imposed. It is not only legally unsound but ironic and unrealistic to use *Furman* as a basis for holding that *hereafter under present statutes* death will be the sole permissible punishment for rape.

Whether the General Assembly *would have prescribed* death or life imprisonment if it had been confronted with the necessity of making that decision cannot be answered. In my view, this question must be answered now by the General Assembly rather than by this Court's speculation as to what the General Assembly at previous sessions would have done if they had been confronted with the necessity of making that decision.

The reliance placed by the majority on *United States v. Jackson,* 390 U.S. 570, 20 L.Ed. 2d 138, 88 S.Ct. 1209 (1968), invites further consideration of that decision. In *Jackson, the death penalty provision* of the Federal Kidnapping Act (18 U.S.C. § 1201 (a)) was held *invalid* because it imposed an impermissible burden upon an accused's exercise of his Fifth Amendment right not to plead guilty and his Sixth Amendment right to demand a jury trial. In *Pope v. United States,* 392 U.S. 651, 20 L.Ed. 2d 1317, 88 S.Ct. 2145 (1968), based on *Jackson, the death penalty provision* of the Federal Bank Robbery Act (18 U.S.C. § 2113(e)) was held *invalid.* No other provision of either of these statutes was invalidated.

The provision for punishment by death "if the verdict of the jury shall so recommend" considered in *Jackson* was incorporated in the Federal Kidnapping Act when rewritten by the Act of May 18, 1934, 48 Stat. 781-82. The death penalty provision considered in *Pope* was a part of the original Federal Bank Robbery Act of May 18, 1934, 48 Stat. 783. Section 3 provided that the violation thereof "shall be punished by imprisonment for not less than 10 years, or by death if the verdict of the jury shall so direct." No statute *amending* or *rewriting the original Act* was involved.

Whether the death penalty provision was a part of the original act or incorporated by later amendment or rewriting

was not the basis of decision in either *Jackson* or *Pope*. Moreover, the decisions in *Jackson* and *Pope* were not based upon the discretionary power granted to the jury. They were based upon the fact that Rule 23(a) of the Federal Rules of Criminal Procedure provided: "Cases required to be tried by a jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the Government." Under this rule, if a defendant was permitted to plead guilty or to waive a jury trial, he would thereby avoid the possibility of a death sentence.

In *State v. Anderson*, 281 N.C. 261, 188 S.E. 2d 336 (1972), the defendant appealed to this Court from a judgment which imposed death sentences based on verdicts of guilty of murder in the first degree (without recommendation of life imprisonment). The murders for which defendant was indicted and convicted were committed on 29 June 1971.

The opinion in *State v. Anderson, supra* at 267, 188 S.E. 2d at 340, states: "*Jackson* and *Pope* stand for the proposition that every defendant has a constitutional right to plead not guilty and that the Federal Constitution does not permit the establishment of a death penalty applicable only to those defendants who assert their constitutional right to contest their guilt before a jury."

Chapter 616, Session Laws of 1953, codified as G.S. 15-162.1, provided in pertinent part as follows: "(a) Any person, when charged in a bill of indictment with the felony of murder in the first degree, or burglary in the first degree, or arson, or rape, when represented by counsel, whether employed by the defendant or appointed by the court under G.S. 15-4 and G.S. 15-5, may, after arraignment, tender in writing, signed by such person and his counsel, a plea of guilty of such crime; and the State, with the approval of the court, may accept such plea. . . . (b) In the event such plea is accepted, the tender and acceptance thereof shall have the effect of a jury verdict of guilty of the crime charged with recommendation by the jury in open court that the punishment shall be imprisonment for life in the State's prison; and thereupon, the court shall pronounce judgment that the defendant be imprisoned for life in the State's prison."

This Court, being of the opinion that the procedure authorized by G.S. 15-162.1 did not preclude a sentence of death after

a conviction by a jury without recommendation of life imprisonment, upheld the convictions and death sentences in the following cases: *State v. Atkinson* (murder), 275 N.C. 288, 167 S.E. 2d 241 (1969); *State v. Hill* (murder), 276 N.C. 1, 170 S.E. 2d 885 (1969); *State v. Roseboro* (murder), 276 N.C. 185, 171 S.E. 2d 886 (1970); *State v. Sanders* (murder), 276 N.C. 598, 174 S.E. 2d 487 (1970); *State v. Williams* (murder), 276 N.C. 703, 174 S.E. 2d 503 (1970); *State v. Atkinson* (rape), 278 N.C. 168, 179 S.E. 2d 410 (1971).

Subsequently, based on *Jackson* and *Pope*, the Supreme Court of the United States reversed the judgments in these cases "insofar as [they] impose[d] the death sentence" and remanded the cases to this Court for further proceedings. *Atkinson v. North Carolina*, 403 U.S. 948, 29 L.Ed. 2d 859, 91 S.Ct. 2283 (1971); *Hill v. North Carolina*, 403 U.S. 948, 29 L.Ed. 2d 860, 91 S.Ct. 2287 (1971); *Roseboro v. North Carolina*, 403 U.S. 948, 29 L.Ed. 2d 860, 91 S.Ct. 2289 (1971); *Sanders v. North Carolina*, 403 U.S. 948, 29 L.Ed. 2d 860, 91 S.Ct. 2290 (1971); *Williams v. North Carolina*, 403 U.S. 948, 29 L.Ed. 2d 860, 91 S.Ct. 2290 (1971); *Atkinson v. North Carolina*, 403 U.S. 948, 29 L.Ed. 2d 861, 91 S.Ct. 2292 (1971).

Thereafter, this Court remanded each of these cases to the superior court where it was tried with directions that judgments imposing sentences of life imprisonment be pronounced. *State v. Atkinson*, 279 N.C. 386, 183 S.E. 2d 106 (1971); *State v. Hill*, 279 N.C. 371, 183 S.E. 2d 97 (1971); *State v. Roseboro*, 279 N.C. 391, 183 S.E. 2d 108 (1971); *State v. Sanders*, 279 N.C. 389, 183 S.E. 2d 107 (1971); *State v. Williams*, 279 N.C. 388, 183 S.E. 2d 106 (1971); *State v. Atkinson*, 279 N.C. 385, 183 S.E. 2d 105 (1971).

In the report submitted by the Judicial Council for consideration by the General Assembly of 1969, attention was called to the possibility that the Supreme Court of the United States would hold that a death sentence could not be imposed and carried out if a defendant could avoid the possibility of a death sentence by pleading guilty and thereby surrendering his right to jury trial. If the General Assembly wished to continue the death penalty, it was recommended that G.S. 15-162.1 be repealed. G.S. 15-162.1 was repealed by Chapter 117, Session Laws of 1969. It is here noted that G.S. 15-162.1 was not detached and invalidated by the decisions of the Supreme Court of the United States in the six cases referred to above.

As noted in *State v. Anderson, supra:* "[F]or some obscure reason, the General Assembly reenacted the provisions of G.S. 15-162.1 by Chapter 562 of the 1971 Session Laws, effective 15 June 1971. Then, apparently to correct the error, G.S. 15-162.1 was again repealed by enactment of Chapter 1225 of the 1971 Session Laws, effective 21 July 1971. It thus appears that from 15 June 1971 to 21 July 1971 the death penalty provisions of our statutes once again applied only to those defendants who asserted their right to plead not guilty. *United States v. Jackson, supra; Pope v. United States, supra; Atkinson v. North Carolina, supra.* Here, the murders were committed on 29 June 1971 while the provisions of G.S. 15-162.1 were in effect, and therefore the death sentences in these cases are unconstitutional and cannot be carried out. *Hill v. North Carolina, supra* [403 U.S. 948, 29 L.Ed. 2d 860, 91 S.Ct. 2287]." The murders having been committed when (reinstated) G.S. 15-162.1 was in effect, this Court vacated the death sentences and remanded the cases to the superior court for the pronouncements of judgments imposing sentences of life imprisonment.

From 1953 until the repeal of G.S. 15-162.1, North Carolina's legislative plan in respect of the death penalty was embodied in G.S. 14-17, G.S. 14-21, G.S. 14-52, G.S. 14-58 and in G.S. 15-162.1. Although enacted in 1953 as a separate statute, G.S. 15-162.1 was *in pari materia* with G.S. 14-17, G.S. 14-21, G.S. 14-52 and G.S. 14-58 as rewritten in 1949. Hence, G.S. 15-162.1 had to be considered as if its provisions were incorporated in G.S. 14-17, G.S. 14-21, G.S. 14-52 and G.S. 14-58 as rewritten in 1949. When the Supreme Court of the United States, on authority of *Jackson* and *Pope,* vacated the death sentences which this Court had upheld in *Atkinson, Roseboro, Sanders,* and *Williams,* it did not hold that G.S. 15-162.1 was invalid. As this Court recognized in *State v. Anderson, supra,* what the Supreme Court held was that so long as G.S. 15-162.1 remained a part of our legislative plan, no death sentence could be imposed or carried out. This objection could be and was removed by the repeal of G.S. 15-162.1. In like manner, the decision in *Furman* does not invalidate any particular clause of G.S. 14-17, G.S. 14-21, G.S. 14-52 or G.S. 14-58. It simply holds that no death sentence can be imposed and carried out as long as our statute contains provisions which leave to the unbridled discretion of a jury whether the punishment shall be death or life imprisonment.

The *Furman* decision was filed 29 June 1972. Its impact upon state statutes similar to our G.S. 14-17, G.S. 14-21, G.S. 14-52 and G.S. 14-58 was considered in the decisions discussed below.

In *State v. Johnson,* 31 Ohio St. 2d 106, 285 N.E. 2d 751 (1972), the jury found the defendant guilty of murder in the first degree and did not recommend mercy. His appeal from a death sentence was decided by the Supreme Court of Ohio on 19 July 1972. The pertinent portion of the Ohio statute provided: "Whoever violates this section is guilty of murder in the first degree and shall be punished by death unless the jury trying the accused recommends mercy, in which case the punishment shall be imprisonment for life." Ohio R.C. § 2901.01 (1954).

The following excerpts from the opinion of Justice Brown set forth the disposition of the appeal and the rationale of the Court's decision:

"The United States Supreme Court, in *Furman v. Georgia* . . . has held that the carrying out of a death penalty imposed at the discretion of the trier of the facts constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

"*Under that holding, which we are required to follow, the infliction of the death penalty under the existing law of Ohio is now unconstitutional* (with the possible exception of the taking of the life or attempting to take the life of the President, Vice President, or a person in the line of succession to the presidency [R.C. 2901.09], or of the Governor or Lieutenant Governor [R.C. 2901.10], which statutes purport to impose a mandatory penalty of death).

"We have reviewed the record of the proceedings in this case and find ample evidence of guilt of murder in the first degree.

* * *

"It is our conclusion that, except as to the death sentence, the judgment of the Court of Appeals is affirmed. With regard to the death sentence, the judgment of the Court of Appeals must be modified and the sentence is reduced to life imprisonment, as prescribed in R.C. 2901.01."

In *Capler v. State*, Miss., 268 So. 2d 338 (1972), the defendant was convicted of murder and sentenced to suffer death. His conviction and sentence were affirmed by the Supreme Court of Mississippi, which also denied his petition for a rehearing. The Supreme Court of the United States granted his petition for certiorari and ordered "that the judgment of the Supreme Court of Mississippi in this case be vacated insofar as it leaves undisturbed the death penalty imposed and that this cause be remanded to the Supreme Court of the State of Mississippi for further proceedings." *Capler v. Mississippi*, 408 U.S. 937, 33 L.Ed. 2d 754, 92 S.Ct. 2862 (1972). This order and mandate followed the decision in *Furman*.

The pertinent Mississippi statute provided: "Every person who shall be convicted of murder shall suffer death, unless the jury rendering the verdict shall fix the punishment at imprisonment in the penitentiary for the life of the convict; or unless the jury shall certify its disagreement as to the punishment as provided by section 1293 [Code of 1930; § 2536, Code of 1942] in which case the court shall fix the punishment at imprisonment for life." Miss. Code of 1942, § 2217 (1957). Upon further consideration, the Supreme Court of Mississippi remanded the case to the trial court for the pronouncement of a judgment of life imprisonment. The rationale of this decision is empitomized by Chief Justice Gillespie in these words: "The only infirmity in section 2217 is that the harsher penalty of death may not lawfully be imposed. The remaining part of the statute is complete, and it does not follow that the remaining provision providing for imprisonment in the penitentiary for the life of the defendant must fall. We hold that because of the decision in *Furman v. Georgia* the death penalty cannot be inflicted; that the remainder of the statute is valid, and the only other punishment for murder is life imprisonment." *Accord, Peterson v. State*, Miss., 268 So. 2d 335 (1972).

In *State v. Square*, La., 268 So. 2d 229 (1972), the defendant's conviction of murder and the death sentence pronounced thereon had been affirmed by the Supreme Court of Louisiana but the Supreme Court of the United States, citing *Stewart v. Massachusetts*, 408 U.S. 845, 33 L.Ed. 2d 744, 92 S.Ct. 2845 (1972), following *Furman v. Georgia*, vacated the judgment insofar as it left undisturbed the death penalty imposed and remanded the case for further proceedings. 408 U.S. 939, 33 L.Ed. 2d 760, 92 S.Ct. 2871 (1972). The pertinent portion

of the Louisiana statute provided: "In a capital case the jury may qualify its verdict of guilty with the addition of the words 'without capital punishment,' in which case the punishment shall be imprisonment at hard labor for life." L.S.A.C.Cr.P. art. 817 (1967).

Upon consideration upon remand, the per curiam opinion of the Supreme Court of Louisiana contains the following:

"We construe the Mandate of the United States Supreme Court to require the imposition of a sentence other than death. Cf., *State v. Shaffer*, 260 La. 605, 257 So. 2d 121 (1971) and *State v. Duplessis*, 260 La. 644, 257 So. 2d 135 (1971).

"Accordingly, in compliance with the Mandate of the United States Supreme Court, the death sentence imposed upon defendant is annulled and set aside, and the case is remanded to the 4th Judicial District Court with instructions to the trial judge to sentence the defendant to life imprisonment.

"Case remanded."

In *Garcia v. State*, 501 P. 2d 1128 (Okla. Crim. 1972), the jury found the defendant guilty of murder and fixed his punishment at death. The pertinent Oklahoma statute provided: "Every person convicted of murder shall suffer death, or imprisonment at hard labor in the State penitentiary for life, at the discretion of the jury. Upon trial of an indictment for murder, the jury, if they find the defendant guilty, must designate in their verdict whether he shall be punished by death or imprisonment for life at hard labor, and the judgment of the court shall be in accordance therewith. But upon a plea of guilty the court shall determine the same." 21 Okla. Stat. Ann. § 707 (1958). On 21 June 1972, the Court of Criminal Appeals of Oklahoma affirmed the conviction and death sentence. However, that decision was modified 26 October 1972, on rehearing, at which time the following order was entered: "In the light of *Furman v. Georgia, Jackson v. Georgia*, and *Branch v. Texas* . . . the judgment and sentence of death by electrocution is modified to a term of life imprisonment, and as so Modified, the judgment and sentence is Affirmed." 501 P. 2d at 1141.

In *People v. Speck*, Ill., 287 N.E. 2d 699 (1972), the jury found the defendant guilty of murder in each of eight cases. His convictions and the death sentences pronounced thereon

were affirmed by the Supreme Court of Illinois. However, the Supreme Court of the United States reversed each judgment insofar as it imposed a death sentence.

The pertinent portions of the Illinois statutes (S.H.A. ch. 38 (1972)) are quoted below:

"§ 9-1. *Murder*

* * *

"(b) Penalty.

"A person convicted of murder shall be punished by death or imprisonment in the penitentiary for any indeterminate term with a minimum of not less than 14 years. If the accused is found guilty by a jury, a sentence of death shall not be imposed by the court unless the jury's verdict so provides in accordance with Section 1-7 (c) (1) of this Code."

* * *

"§ 1-7. *Judgment, Sentence and Related Provisions*

* * *

"(c) Capital Offenses.

"(1) Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, the jury may return a verdict of death. Where such verdict is returned by the jury, the court may sentence the offender to death or to imprisonment. Where such verdict is not returned by the jury, the court shall sentence the offender to imprisonment."

Upon remand of the *Speck* case, Justice Schaefer, speaking for the Supreme Court of Illinois, said: "The Supreme Court has now held that a defendant could not be validly sentenced to death under the same Illinois statutes that are applicable to this case. *(Moore v. Illinois* (1972), ... U.S. ....., 92 S.Ct. 2562, 33 L.Ed. 2d 706; *Furman v. Georgia*. . . .) Therefore, the death penalty cannot be reimposed on the defendant, and the only remaining question is the procedure to be followed in resentencing him to a sentence other than death."

In *Commonwealth v. Bradley,* Pa. 295 A. 2d 842 (1972), the jury found the defendant guilty of murder in the first degree and fixed the penalty at death. On direct appeal, the conviction was affirmed but the death sentence was vacated and the *defendant was sentenced to life imprisonment.* The pertinent

portion of the Pennsylvania statute provided: "Whoever is convicted of the crime of murder of the first degree is guilty of a felony and shall be sentenced to suffer death in the manner provided by law, or to undergo imprisonment for life, at the discretion of the jury trying the case, which shall, in the manner hereinafter provided, fix the penalty." 18 Pa. Stat. Ann. § 4701 (1963). The ground of decision was stated by Justice Roberts as follows: "In *Furman v. Georgia,* . . . the United States Supreme Court recently held *that the imposition of the death penalty under statutes such as the one pursuant to which the death penalty was imposed upon appellant is violative of the Eighth and Fourteenth Amendments.* Accordingly, appellant's sentence of death may not now be imposed." 295 A. 2d at 845. (Our italics.) *Accord, Commonwealth v. Sharpe,* Pa., 296 A. 2d 519 (1972); *Commonwealth v. Lopinson,* Pa., 296 A. 2d 524 (1972); *Commonwealth v. Ross,* Pa., 296 A. 2d 629 (1972).

In *Graham v. State,* Ark., 486 S.W. 2d 678 (1972), the jury found the defendant guilty of murder in the first degree and did not recommend a life sentence. The pertinent Arkansas statute provided: "The jury shall have the right in all cases where the punishment is now death by law, to render a verdict of life imprisonment in the State penitentiary at hard labor." Ark. Stat. Ann. § 43-2153 (Repl. 1964). Upon defendant's appeal, the Supreme Court of Arkansas upheld the conviction but remanded the case to the trial court for the pronouncement of a judgment of life imprisonment. The following excerpt from the opinion of Justice Byrd indicates the ground of decision: "[T]he U. S. Supreme Court, as presently constituted, has recently decided that where a jury is permitted to decide between the punishments of life and death, the death penalty constitutes 'cruel and unusual punishment' and that such interpretation is applicable to the several states through the Fourteenth Amendment. See *Furman v. Georgia.* . . .

"So long as the ruling in *Furman v. Georgia, supra,* is made applicable to this State, we are obliged to reduce appellant's sentence from death to life imprisonment as being the next highest available penalty, Ark. Stat. Ann. § 43-2308 (Repl. 1964)." 486 S.W. 2d at 679.

In *State v. Baker,* Wash., 501 P. 2d 284 (1972), the jury found defendant guilty of murder in the first degree and asked that the death penalty be inflicted. The pertinent portion of

the Washington statute provided: "Murder in the first degree shall be punishable by imprisonment in the state penitentiary for life, unless the jury shall find that the punishment shall be death. . . ." R.C. Wash. Ann. § 9.48.030 (1961). Notwithstanding the jury's request, the trial judge deferred imposition of the death penalty on the condition that the defendant be incarcerated for life not subject to parole. The case was before the Supreme Court of Washington on the State's appeal from that order. In remanding the case for a proper sentence in the light of *Furman*, the Court said: "The decision in *Furman* has rendered the issue presented here moot *since the state is now precluded from any attempt to have the death penalty imposed under the existing statute.* The question whether a trial court may defer the death penalty has become academic." *Id.* at 284-85. (Our italics.)

In *Huggins v. Commonwealth*, Va., 191 S.E. 2d 734 (1972), the jury found the defendant guilty of first degree murder and fixed his punishment at death. The pertinent statute provided: "Murder of the first degree shall be punished with death, or by confinement in the penitentiary for life, or for any term not less than twenty years." Va. Code 1950 § 18.1-22. Based on *Furman*, Justice Poff, for the Supreme Court of Virginia, said: "Insofar as it authorized discretionary imposition of the death penalty Virginia's statute is unconstitutional. With respect to the death sentence, the judgment is vacated." *Id.* at 735. The conviction was upheld and the case was remanded for a new trial on the issue of punishment, that is, to determine whether the confinement in the penitentiary was to be for life, or for a term of twenty years, or for a term exceeding twenty years. *Accord, Hodges v. Commonwealth*, Va., 191 S.E. 2d 794 (1972).

Although the above-cited decisions in which death sentences were reversed and sentences of life imprisonment were substituted therefor involved crimes committed prior to *Furman*, none suggests that a death sentence may be imposed and carried out unless and until present statutory provisions are amended. All either state or clearly imply that under existing statutes the death sentence may not be imposed and carried out without regard to whether the crime was committed before or subsequent to *Furman*.

The Florida, Louisiana and Pennsylvania cases discussed below relate to current and future problems of procedure be-

cause of unequivocal holdings that under existing statutes a death penalty cannot be imposed and carried out.

In *Donaldson v. Sack*, 265 So. 2d 499 (Fla. 1972), Donaldson, who had been indicted for murder in the first degree, filed his petition in the Supreme Court of Florida for a writ of prohibition. Fla. Const. Art. V, § 9(2), vested in the criminal courts of record jurisdiction of "all criminal cases not capital." Fla. Const. Art. V, § 6(3), vested in the circuit courts "all criminal cases not cognizable by subordinate courts." Donaldson asserted that respondent, Circuit Court Judge Sack, had no jurisdiction to proceed with his case because, as a result of the decision in *Furman*, "capital cases" no longer existed in Florida.

On 29 June 1972, when *Furman* was decided, Florida statutes then in force included the following:

"The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in § 775.082." Fla. Stat. Ann. § 782.04(1) (1972 Supp.).

"Whoever ravishes and carnally knows a female of the age of ten years or more by force and against her will, or unlawfully or carnally knows and abuses a female child under the age of ten years, shall be guilty of a capital felony, punishable as provided in § 775.082. . . ." Fla. Stat. Ann. § 794.01 (1972 Supp.).

"A person who has been convicted of a capital felony shall be punished by death unless the verdict includes a recommendation to mercy by a majority of the jury, in which case the punishment shall be life imprisonment. A defendant found guilty by the court of a capital felony on a plea of guilty or when a jury is waived shall be sentenced to death or life imprisonment, in the discretion of the court." Fla. Stat. Ann. § 775.082(1) (1972 Supp.).

A Florida statute which became effective 1 October 1972, and is now codified as section 775.082(2) and (3), provided: "(2) In the event *the death penalty* in a capital felony is held to be unconstitutional by the Florida Supreme Court or the

United States Supreme Court, a person who has been convicted of a capital felony shall be punished by life imprisonment.

"(3) In the event *the death penalty* in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment with no eligibility for parole." (Our italics.)

Exerpts from the opinion of Judge Dekle are quoted below.

"Since *Furman v. Georgia* . . . in effect 'removes' (until new legislation which may revive it) 'capital cases,' then there appears to be no logical escape from the fact that our circuit courts at this time, and until any legislation which may revive 'capital cases,' do not have jurisdiction in those cases heretofore delineated as 'capital' and accordingly subsequent to *Furman* jurisdiction in such cases now pending or being filed vests in the courts of record and may be transferred there in those 17 counties of Florida which have such courts."

"We are unable in the face of existing authorities and logic to find support for the continuance of 'capital offense' as heretofore applied. Accordingly, it must fall with the U. S. Supreme Court's holding against the death penalty as provided under present legislation. Our decision is compelled by that Court's action."

"We find no difficulty with a continuation of the *sentencing* for these former 'capital offenses' under § 775.082(1) as automatically life imprisonment upon conviction, inasmuch as that is the only offense left in the statute. . . . The elimination of the death penalty from the statute does not of course destroy the entire statute. We have steadfastly ruled that the remaining consistent portions of statutes shall be held constitutional if there is any reasonable basis for doing so and of course this clearly exists in these circumstances."

"The removal of capital punishment only removes 'capital cases' as that term has been known. The *offense*—and the imposition of a life sentence upon conviction—remains. . . . There simply is not at this time such a designation as a 'capital case' as set forth in the several provisions of our Constitution, statutes and rules."

Since there were no "capital cases" under existing Florida statutes, the court then discusses the drastic impact of its decision upon Florida's Criminal Rules relating to (1) the requirement of twelve jurors in a "capital case," (2) provisions for a speedy trial, (3) jury selection procedures, (4) bifurcated trial procedures, (5) necessity for indictment by a grand jury, and (6) right to bail.

In *Anderson v. State*, 267 So. 2d 8 (Fla. 1972), the Supreme Court of Florida, based on *Furman*, vacated the death sentences of forty defendants. It corrected the sentences of those who had been convicted of murder in the first degree by providing that each be imprisoned for the term of his natural life. In doing so, the Court said: "The elimination of the death penalty from the statute prescribing the penalty for murder in the first degree does not destroy the whole statute. The only sentence which can now be imposed upon conviction of the crime of murder in the first degree is life imprisonment. This is an automatic sentence and a reduction from the sentence previously imposed. The Court has no discretion." The defendants in the rape cases having been convicted for rapes committed prior to 1 January 1972, were subject to imprisonment for life *or* for any term of years within the discretion of the Court. Fla. Stat. Ann. § 794.01 (1944). Their cases were remanded for resentencing.

On authority of *Donaldson* and *Anderson, supra*, the Supreme Court of Florida in *State v. Whalen*, 269 So. 2d 678 (Fla. 1972), held that a trial judge, sitting as sole trier of fact after accepting a plea of guilty to first degree murder and holding an evidentiary hearing on the issue of the extent of penalty, did not have power to impose the death sentence. Chief Justice Roberts said: "This question concerning bifurcated trials is moot since at the present time capital punishment may not be imposed. This Court has held that there are currently no capital offenses in the State of Florida. If there is no capital offense, there can be no capital penalty." *Id.* at 679.

In Ex Parte Contella, 485 S.W. 2d 910 (Tex. Crim. 1972), the appeals were from orders in habeas corpus proceedings in which the accused were denied bail after indictment for murder with malice. The Texas Constitution contained this provision: "All prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident. . . ." A Texas statute provided: "All prisoners shall be bailable unless for capital

offenses when the proof is evident." A capital felony was defined by statute as "(a)n offense for which the highest penalty is death." The cited Texas decisions had held that "[t]he term 'proof is evident' means the accused, with cool and deliberate mind and formed design, maliciously killed the deceased, and that upon a hearing of the facts before the court a dispassionate jury would, upon such evidence, not only convict but would assess the death penalty." Vernon's Ann. P.C. art. 1257 provides: "The punishment for murder shall be death or confinement in the penitentiary for life or for any term of years not less than two." Vernon's Ann. C. Crim. Proc. art. 3707 (1972 Supp.) provides that, in capital cases, where the state has made it known in writing prior to trial that it will seek the death penalty, the punishment must be assessed by the **jury.**

The following excerpts from the opinion of Judge Roberts set forth the disposition of the appeals and the rationale of the decision.

"In the case of *Furman v. Georgia* . . . the United States Supreme Court held that the death penalty, at least insofar as it is currently imposed in this country, 'constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.' That being the case, we conclude that the death penalty, as it is currently authorized, may not be imposed as a penalty for the crime of murder.

"In light of this holding, the question which is before the Court is whether, in terms of our Constitution and statute, bail may now be denied in cases in which, prior to the holding in *Furman v. Georgia, supra,* the death penalty could have been imposed. We conclude that bail may not be denied in such cases.

* * *

"We therefore conclude that bail may no longer be denied on the ground that the offense is a capital offense and the proof is evident. Since the death penalty may not be imposed, there no longer exists a 'capital felony' as defined in Art. 47, V.A.P.C. Likewise, since the death penalty is no longer a possible penalty, it is impossible for the State to offer evidence, in this or any other case, sufficient to establish that the 'proof is evident' as that term is defined in *Ex parte Paul, supra.* Therefore, there is no case in which bail may be denied under the

provisions of Art. 1, Section 11 of the Texas Constitution or Art. 1.07, V.A.C.C.P.

"The orders denying bail are reversed and the trial judge is ordered to set bail herein." 485 S.W. 2d at 911-912.

In *Commonwealth v. Truesdale,* Pa., 296 A. 2d 829 (Nov. 1972), the defendant was awaiting trial on indictments of first degree murder and conspiracy. Under the Pennsylvania Constitution a "capital" offense is not bailable and defendant had been denied bail. After the decision in *Furman,* defendant made an application for his release on bail on the ground that *Furman* abolished the death penalty as it theretofore had existed in Pennsylvania. After a hearing, the trial court granted bail. The Commonwealth immediately filed a petition in the Supreme Court requesting the assumption of plenary jurisdiction to determine whether defendant had a right to bail pending trial. The Court observed that "[w]ith the decision of the United States Supreme Court in *Furman v. Georgia* . . . as well as this Court's decision in *Commonwealth v. Bradley,* Pa., 295 A. 2d 842 (1972), *which cases have invalidated the death penalty as it presently exists in Pennsylvania,* we are left to decide if the definition of 'capital offense' which we adopted in *Alberti* requires that the the bail set for Truesdale was proper." 296 A. 2d at 832 (Our italics.) Holding that bail was properly granted, the Court stated that "since there are presently no criminal offenses in the Commonwealth for which the death penalty may be imposed, there are no 'capital offenses'; hence, by mandate of our Constitution, all offenses are bailable prior to trial." *Id.* The Court clearly recognizes and accepts the fact that the effect of the *Furman* decision was to make "the maximum penalty for murder in the first degree . . . life imprisonment." 296 A. 2d at 835.

In *State v. Holmes,* La. 269 So. 2d 207 (1972), and in *State v. Flood,* 269 So. 2d 212 (La. Nov. 1972), the Supreme Court of Louisiana held that *Furman* did not destroy the classification of certain crimes in Louisiana as capital offenses. The impact of *Furman* was described in these words: "The crime [of murder] remains unchanged; only the penalty has been changed. True, the penalty is what made murder a capital offense, and is not actually a capital offense in Louisiana today. But the *nature* of the offense has not changed—only the punishment." *State v. Flood, supra* at 214. Hence, *Holmes* held that a person charged with a crime formerly punishable by

death had to be tried by a jury of twelve, all of whom must concur to render a verdict; and *Flood* held that a person so charged was not entitled *as of right* to be released on bail.

The majority opinion cites *Delaware v. Dickerson,* Del. Supr., ____ A. 2d ____ (Nov. 1972). This is the only decision disclosed by our research which supports to any extent the view of the majority herein. Dickerson was charged with a first degree murder committed prior to the decision in *Furman.* Two questions of law were certified by the Superior Court to the Supreme Court, to wit: "1. Are the discretionary mercy provisions of 11 *Del.C.* § 3901 unconstitutional under *Furman v. Georgia?* 2. If the answer to Question 1 is yes, is the mandatory death penalty prescribed in 11 *Del.C.* § 571 constitutional?" Both questions were answered "Yes."

11 Del.C. § 571 provided that whoever committed the crime of first degree murder as defined therein "shall suffer death." 11 Del.C. § 3901 provided: "In all cases where the penalty for crimes prescribed by the laws of this state is death, if the jury, at the time of rendering their verdict, recommends the defendant to the mercy of the Court, the Court may, if it seems proper to do so, impose the sentence of life imprisonment instead of death."

The questions certified seem to have been adroitly phrased to elicit the answers which were given. The true question was whether *Furman* had invalidated the death penalty provision of the Delaware statute. All justices (3) of the Supreme Court of Delaware concurred in answering the certified questions as stated above. The majority (2) held that the death penalty could not be applied retroactively to the defendant in the case under consideration. This is an excerpt from the majority opinion: "Having determined that the mandatory death penalty provision of the Murder Statute, standing alone, may not be applied retroactively, we are left with the problem of pointing to the statutory, common law, or inherent power of the Superior Court under which the sentence may be imposed upon a conviction of murder in the first degree for which the mandatory death penalty of the Murder Statute may not be imposed. That question was not certified and was not briefed or argued by counsel." Chief Justice Wolcott dissented from "the majority's conclusion that 11 *Del.C.* § 571 may not be applied retroactively by the courts of this State." His dissent is based on this premise: "The Supreme Court of the United States—

not this Court—has held that the Mercy Statute is unconstitutional. We, of course, are bound by this decision, but we have not made it." Suffice to say, in my view *Furman* held only that *the death penalty provision* of the Delaware statute was invalid. Therefore, as I see it, the holdings of the Supreme Court of Delaware in Dickerson were not required or supported by *Furman.*

I agree that the *Furman* decision has not established the proposition that capital punishment under all circumstances constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States. Moreover, nothing in the *Furman* decision would seem to invalidate a statute of our General Assembly prescribing death as the sole and exclusive punishment for murder in the first degree, rape, burglary in the first degree, or arson. Whether such a statute should be enacted is for legislative determination. The majority opinion states: "We recognize that the Legislature, not the Courts, decides public policy, responds to public opinion and, by legislative enactment, reflects society's standards. The matter of retention, modification or abolition of the death penalty is a question for the law-making authorities rather than the courts." With this statement I emphatically agree. However, in their directive that death shall be the sole and exclusive punishment for all crimes of first degree murder, rape, first degree burglary, and arson, committed *after the filing of this decision,* the majority, in my view, have assumed to act in a legislative rather than in a judicial capacity. Thereby they demonstrate the difference between precept and practice. Of course, the practical effect of today's decision is to place upon those members of the General Assembly who favor the abolition or limitation of capital punishment the burden of initiating and passing legislation to that effect.

It is my view that, unless and until G.S. 14-17, G.S. 14-21, G.S. 14-52, and G.S. 14-58 are amended by our General Assembly, *Furman* requires that trials be conducted solely to determine the guilt of the defendant; and, if found guilty of murder in the first degree, rape, burglary in the first degree, or arson, that the defendant be sentenced to life imprisonment as the only permissible punishment.

Justice SHARP concurring in the opinion of Chief Justice Bobbitt:

I concur fully with the views expressed by the Chief Justice in his well-documented opinion and in his conclusion that the effect of *Furman* is to invalidate the death penalty under the laws of this State as presently written and to make life imprisonment the punishment for first degree murder, rape, arson, and first degree burglary. In signifying my concurrence I add these comments:

In my view, there are no constitutional infirmaties in capital punishment *per se* and, under the conditions prevailing today, I do not consider the death penalty cruel and unusual punishment for the crimes for which the State Constitution authorizes the General Assembly to prescribe it. Thus, were I to permit my personal views on capital punishment as a State policy to dictate my decision in this case, I would have voted with the majority. This, however, I am not at liberty to do.

The majority decision is based upon the supposition that in 1949, when the legislature *rewrote and re-enacted* G.S. 14-21, it would have left the statute unchanged had it known the United States Supreme Court would invalidate the death penalty as authorized in the rewritten section. With all deference, I do not attribute to the majority such occult powers. They cite the failure of seventeen bills or resolutions introduced in the General Assembly to abolish or limit capital punishment. However, they fail to mention the similar fate of the two Judicial Council bills which, in 1969 and 1970, sought to repeal the power of commutation which the legislature had given the jury trying a capital case and to make the death sentence mandatory for the four crimes. In short, the legislature rejected the proposal that capital punishment be retained without the discretionary power in the trial jury to determine whether the convict's sentence should be death or life imprisonment.

The question of capital punishment is one of high public policy, and the constitutional mandate is that it shall be determined by the legislature—not by the judiciary. N. C. Const. art. I, § 6 declares: "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." The history of the Supreme Court of North Carolina has been one of judicial restraint and strict adherence to the doctrine of the separation of powers. Our opinions abound with declarations that public policy is the exclusive province of the legislature and its determination is not subject to judicial review; and that the wisdom or impolicy of the law

is solely for the legislature and we have neither the power nor the desire to usurp its prerogative. *See* 2 North Carolina Digest *Const. Law* §§ 6, 10 (1967) and cases cited therein.

This Court, which has consistently deplored the encroachment of other courts upon the legislative prerogatives during the past decade, now follows suit and sets its own example of judicial overreaching by changing the penalty for rape, first degree murder, arson and first degree burglary "from death or life imprisonment in the discretion of the jury to mandatory death." The majority concede that this is "an upward change of penalty" which cannot be applied retroactively. Thus, while giving lip service to the doctrine of separation of powers, this Court does today what the legislatures of 1969 and 1971 declined to do. Had this action been taken by the General Assembly, I would have neither legal nor personal objections. However, when the Court takes such action, in my view, it violates fundamental constitutional principles. I therefore dissent from the conclusion reached by the majority in the advisory opinion.

APPENDIX B

State v. Jarrette

In Full Text

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM 1974

STATE OF NORTH CAROLINA v. HENRY N. JARRETTE

No. 46

(Filed 25 February 1974)

1. Criminal Law § 92— four offenses — consolidation for trial

The trial court did not err in consolidating for trial charges against defendant for murder, rape, kidnapping and armed robbery where the offenses constituted a continuing criminal episode lasting some two and one-half hours and were so related in time and circumstance as to permit the admission in evidence of each in the trial of the others. G.S. 15-152.

2. Criminal Law § 15; Jury § 2— change of venue — special venire

The trial court in this prosecution for murder, rape, kidnapping and armed robbery did not abuse its discretion in the denial of defendant's motion for a change of venue or for a special venire from another county on the ground of pretrial publicity where the newspaper stories relating to the crimes were within the normal limits of newspaper reporting of criminal activity, the circumstances under which the crimes were committed attracted the attention of all news media of the State, and defendant offered no evidence that such publicity was more widespread in the county of trial than in any other county to which the case might have been removed in accordance with G.S. 1-84.

3. Criminal Law § 15— improper venue — waiver — motion for venue change because of local prejudice

Although another county was the proper venue for trial of defendant on a kidnapping charge, defendant waived venue by going to trial without requesting transfer to the proper county, defendant's motion for change of venue on the ground of local prejudice not being such a request.

4. **Jury § 6— motion to question prospective jurors separately, out of presence of other jurors**

The trial court did not abuse its discretion in the denial of defendant's motion that prospective jurors be questioned separately, out of the presence of other selected or prospective jurors, on the ground a prospective juror right refer during the *voir dire* to what he had read or heard through the news media concerning the defendant's being an escaped prisoner.

5. **Jury § 6— prospective jurors — questions concerning views on capital punishment**

In this prosecution for murder, rape, kidnapping and armed robbery, the trial court did not err in permitting the solicitor to propound questions to prospective jurors concerning their views about the death penalty.

6. **Constitutional Law § 29; Criminal Law § 135; Jury § 7— jurors opposed to capital punishment — challenge for cause**

In a prosecution for murder and rape, the trial court properly allowed the State's challenges for cause to prospective jurors who stated, in effect, that under no circumstances could they vote for a verdict which would result in the imposition of the death penalty.

7. **Criminal Law §§ 34, 128— motion for mistrial — statement by prospective juror**

The trial court did not err in the denial of defendant's motion for a mistrial made on the ground that a prospective juror stated, in the presence of other prospective and selected jurors, that he remembered, he believed, having read that defendant had been declared an outlaw.

8. **Jury § 7— challenge for cause — juror who saw television news report about trial**

The trial court did not err in the denial of defendant's challenge for cause to a juror who had seen a television news report about the case the night before he was called into the jury box where defendant's interrogation of the juror developed no information indicating any prejudice against defendant or any preconceived idea concerning his guilt or innocence, and the juror stated upon inquiry by the court that he could give defendant a fair and impartial trial without being influenced by what he had previously heard.

9. **Criminal Law § 73— declaration of decedent showing intent — exception to hearsay rule**

In a murder prosecution wherein the State's evidence tended to show that the victim was stabbed by defendant while sitting in his brother's car at a launderette, testimony by the victim's brother that, when he borrowed the car and immediately before driving off in it, the victim said he was going to the launderette was admissible as an exception to the hearsay rule and as a part of the *res gestae* of the borrowing and departure.

10. **Criminal Law § 66— pretrial photographic identification — in-court identification — independent origin**

An officer's in-court identification of defendant as the driver of a car which the officer pursued was properly admitted, though the officer had identified defendant from photographs, where the officer's testimony was based on what he saw in the course of his pursuit of the car, there is nothing in the record to indicate that the photographs or the circumstances under which the officer saw them were impermissibly suggestive and there is nothing to indicate a substantial likelihood of irreparable misidentification through inspection of the photographs.

11. **Criminal Law § 34— nonresponsive testimony disclosing defendant is prison escapee**

In a prosecution for murder, rape, kidnapping and armed robbery, the trial court did not err in the denial of defendant's motion for mistrial made on the ground that an F.B.I. agent's nonresponsive statement implying that defendant had escaped from prison constituted inadmissible evidence that defendant had committed a prior criminal offense where the court properly instructed the jury not to consider such statement.

12. **Criminal Law §§ 34, 75— confessions — statements that defendant was prison escapee**

In this prosecution for murder, rape, kidnapping and armed robbery, the trial court did not err in the admission of written and oral confessions containing statements by defendant to the effect that he had escaped from prison where defendant interposed only general objections to testimony relating to the confessions, *voir dire* examinations prior to introduction of the statements show that defendant's concern was directed to whether the statements were voluntary and made with knowledge of defendant's constitutional rights, the trial court found upon supporting evidence that the confessions were not impermissibly obtained, and defendant did not request the court to strike or to instruct the jury to disregard expressions in the confessions showing that defendant was an escaped prisoner; furthermore, the admission of such expressions was harmless in view of the detailed confessions by defendant and the testimony by the rape and kidnapping victim who also witnessed the murder and armed robbery.

13. **Criminal Law § 117— instructions — believing all or none of witness's testimony — omission of "or any part"**

Trial court's omission of the words "or any part" from its instruction that the jury "may believe all that a witness says or you may believe none" was a technical omission which could not have affected the result and did not entitle defendant to a new trial.

14. **Criminal Law § 111; Rape § 6— improper punctuation of instruction — no right to new trial**

Although an instruction as shown in the record would appear to permit the jury to find defendant guilty of rape if defendant put the alleged victim in the back seat of a car by force and against her will rather than requiring the sexual intercourse to be by force and against her will, defendant is not entitled to a new trial where the insertion of commas before and after a phrase in the instruction makes the instruction completely accurate, since the court reporter's punctuation of the judge's charge is not sufficient evidence of error to warrant a new trial.

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15. Rape § 6— failure to submit lesser offense

The trial court in a rape case did not err in failing to submit to the jury the lesser included offenses of assault with intent to commit rape and assault on a female where all the evidence showed completion of the act of sexual intercourse after the victim was abducted, with threats to injure her if she made an outcry, and transported, with her hands tied behind her back, to a remote spot where the act of intercourse was committed, and that defendant had a knife at all times.

16. Homicide § 30— failure to submit second degree murder

The trial court in a prosecution for first degree murder did not err in failing to submit to the jury the question of defendant's guilt of second degree murder where all the evidence was to the effect that defendant stabbed and killed the victim for the purpose of stealing the automobile in which the victim was sitting and that the killing was with premeditation and deliberation.

17. Constitutional Law § 36; Criminal Law § 135— mandatory death penalty for certain crimes — reaffirmation of decision

The decision of *State v. Waddell*, 282 N.C. 431, holding that a defendant lawfully convicted of an offense of first degree murder, rape, first degree burglary or arson committed after 18 January 1973 must be sentenced to death, is reaffirmed. G.S. 14-17; G.S. 14-21; G.S. 14-52; G.S. 14-58.

18. Criminal Law § 138— punishment — construction of State statute — decision of N. C. Supreme Court

The determination of what statutes of this State mean with reference to the punishment to be imposed for criminal offenses is a question of State law and the determination thereof by the N. C. Supreme Court is authoritative.

19. Constitutional Law § 2— construction of State Constitution — decision of N. C. Supreme Court

The meaning of the State Constitution is a matter of State law upon which the decision of the N. C. Supreme Court is final.

20. Constitutional Law § 36; Criminal Law § 135— death penalty — constitutionality — powers of solicitor, jury and Governor

The death penalty is not unconstitutionally discretionary and arbitrary because (1) the solicitor has the power to prosecute for a lesser charge, (2) the jury has the power to acquit or to convict of a lesser charge and (3) the Governor has the power to commute the sentence or grant a pardon.

21. Constitutional Law § 36; Criminal Law § 135— death penalty — constitutionality — number of death sentences

The number of death sentences imposed since the decision of *State v. Waddell*, 282 N.C. 431, does not show that such decision was contrary to the intent of the Legislature.

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22. Constitutional Law § 36; Criminal Law § 135— death penalty — constitutionality — number of death sentences

The small number of death sentences imposed since the decision of *State v. Waddell*, 282 N.C. 431, does not show that the death penalty is imposed arbitrarily in this State.

23. Constitutional Law § 36; Criminal Law § 135— death penalty — constitutionality — imposition on non-whites

There is no merit in defendant's contention that the death penalty is unconstitutional on the ground that those sentenced to death since the decision of *State v. Waddell* are predominantly non-white.

24. Constitutional Law § 36; Criminal Law § 135— death penalty — constitutionality — public opinion

There is no merit in defendant's contention that the death penalty constitutes cruel and unusual punishment because public opinion has overwhelmingly repudiated it, it being clear that there is widespread opinion both in this State and the nation that the death penalty is the appropriate punishment for certain crimes.

25. Constitutional Law § 36; Criminal Law § 135— death penalty — constitutionality — obtaining goals of punishment

There is no merit in defendant's contention that the death penalty for rape and murder is unconstitutional on the ground that it is futile because it is not the most effective means for obtaining the goals of criminal punishment since the Legislature is not required to prescribe the most efficacious punishment for crime but it is sufficient that reasonable men can believe that the punishment prescribed is reasonably adapted to the attainment of the goals of all criminal punishment, and since the statutes prescribing the punishment for murder and rape meet this constitutional standard.

Chief Justice BOBBITT dissenting as to death sentences.

Justices HIGGINS and SHARP join in dissenting opinion.

Justice SHARP concurring further in dissenting opinion.

APPEAL by defendant from *McConnell, J.*, at the 18 June 1973 Criminal Session of UNION. This case was docketed and argued as No. 98 at the Fall Term 1973.

The defendant was found guilty of the rape of Gwendolyn Blackmon, a 16 year old Negro girl; the first degree murder of David Timothy Parker, a 16 year old white boy; the kidnapping of Gwendolyn Blackmon; and the armed robbery of David Timothy Parker. He was sentenced to death for the rape and for the murder and to imprisonment for life for the kidnapping. Prayer for judgment was continued on the charge of armed robbery, the State having relied upon this felony as an essential element of the murder in the first degree. The defendant appealed from all three of the judgments imposed, setting forth

126 assignments of error, many of which were abandoned in his brief. Many others present the same question of law.

Prior to the selection of the jury, the defendant made certain pretrial motions, including a motion for change of venue. From exhibits offered by the defendant in support of this motion, it appears that on 9 February 1973 the defendant was serving a sentence of 23 to 28 years in Odom Prison for two murders by stabbing with a knife, a circumstance not disclosed by the evidence presented in the presence of the jury in the present cases. It further appears from these exhibits that he was permitted to leave the prison on that date to attend a state convention of the Junior Chamber of Commerce (Jaycees), he being an officer in the chapter of that organization established in Odom Prison. While at the convention, he eluded the guard who had accompanied him and escaped. Two days later, he was in Charlotte and engaged in the activities from which the present charges arise. Four days thereafter, he was arrested by agents of the Federal Bureau of Investigation in Memphis, Tennessee. Waiving extradiction, he was returned to Union County for trial.

The defendant offered no evidence before the jury. That introduced by the State showed, in substance, the following:

At approximately 3:30 p.m. on Sunday, 11 February 1973, Gwendolyn Blackmon, a 16 year old Negro high school student, drove alone in her automobile to the Charlotte Public Library. As she was getting out of her car in the parking lot, a man, whom she had never seen before but whom she positively identified, in court, as the defendant, pushed her back into the car, telling her that if she screamed or did not "go along with what he said," he would kill her, tied her hands behind her back, showed her a "scout knife," compelled her to lie down on the seat, took her keys from her purse and drove off with her in the car, telling her he was a sex maniac.

Upon arriving at a location, subsequently pointed out by Gwendolyn Blackmon to the sheriff, on a dirt road in rural Union County, the defendant put the girl into the back seat of the car, disrobed her completely and, with the knife at hand, had sexual intercourse with her, following which he committed an unnatural sexual act upon her. When, prior to these acts, she begged him not to touch her, he replied that he "didn't like for people to beg him, so please stop begging." Following these acts, he instructed her to get dressed and, when she did so, he retied her hands behind her back. They returned to the front seat of the car and the defendant drove to the town of Waxhaw. En route, he told her he wished she were white because, if she were, he would kill her, but "if he could find a way of getting another car," he would give her car back to her and let her go free.

Arriving at the launderette in Waxhaw, the defendant parked beside another car, a 1971 Pontiac Grand Prix, yellow with a cream vinyl top, in which a 16 year old white boy, David Timothy Parker, sat alone. The defendant, taking the keys to Gwendolyn Blackmon's car with him, and leaving her in her car with her hands still tied behind her back, walked over to the boy's car. The Parker boy rolled down his window and the defendant engaged him in a brief conversation. The defendant then pulled the knife from his pants and stabbed the boy twice. The boy tried to get out of the other side of his car but was unable to do so. The blood was gushing from his mouth and nose. The defendant shoved the dying boy over onto the passenger's side of the front seat, got in the car and drove away. He returned momentarily to untie Gwendolyn Blackmon's hands and give her back the keys to her car. Thereupon, she returned to her home in Charlotte and reported what had happened to her parents and to the police.

At about 5:00 p.m. that afternoon, David Timothy Parker had borrowed his brother's 1971 Pontiac Grand Prix, yellow with a white vinyl top, saying he was going to the launderette. On 13 February, his body was discovered in a roadside ditch, 5.4 miles from the Waxhaw launderette. The cause of his death was a deep stab wound in the left chest. The Parker automobile was discovered in Charlotte, the night of 11 February. Its interior was quite bloody. No one other than David Timothy Parker had the owner's permission to drive it.

At approximately 9:00 p.m. on 11 February, Charlotte Police Officers Griffin and Callahan, while patrolling in a police automobile, observed the Parker car parked beside a telephone booth and a man, identified, in court, by Officer Griffin as the defendant, standing in the booth. They turned into the parking lot. As they drew near the Parker automobile, the defendant drove away in it. The officers pursued him with their blue light flashing and horn blowing. They bumped the Parker car several times in unsuccessful efforts to stop it. Finally, the defendant slowed down, jumped from the car and fled on foot. He was

pursued by Officer Griffin but escaped by climbing over a fence which the officer was unable to climb. On the ground at that point, Officer Griffin found a coat containing a name plate bearing the defendant's name. The coat was identified by Gwendolyn Blackmon as the one worn by her assailant. A "hunting knife" was found in the glove compartment of the Parker automobile by the police officers. It was not there when the vehicle was lent by its owner to David Timothy Parker. It was identified by Gwnedolyn Blackmon as the knife used by her assailant in her abduction and in the stabbing of David Timothy Parker.

On 15 February, F.B.I. Agents Phelps and Cooper located and arrested the defendant in Memphis, Tennessee, a warrant charging unlawful flight having been issued for his arrest. The defendant was then carrying in his pocket a kitchen knife with a six-inch serrated blade. Following a voir dire examination, duly conducted, the trial court found that the defendant had been given the full Miranda warning by these officers, had signed a written waiver of his right to counsel prior to interrogation by them, was then not under the influence of intoxicating beverages, was experienced in matters of police interrogation, was well versed in his constitutional rights, was not threatened or promised any reward and signed voluntarily a written statement, which statement was admitted into evidence. It was to the following effect:

While in Raleigh attending a Jaycee meeting, the defendant walked away. By "hitching" rides and traveling by bus, he arrived in Charlotte. There he saw a Negro girl getting out of her car near the library, "told her to shove over and not to holler" or he would hurt her, took her in her car out into the country and there "made love" to her after explaining that he did not want to hurt her. Then he drove on with the girl, in her car, to Waxhaw where they observed a white boy sitting in a car in the parking lot of a launderette. The defendant parked close to the other vehicle, got out, approached the boy, engaged him in a brief conversation, pulled out his knife, stabbed the boy, shoved him over to the passenger's side where he died in two or three minutes, and drove off with the boy's body in the car. After driving around fifteen or twenty minutes, he put the body in the ditch and proceeded back to Charlotte where he stopped at a telephone booth and called his mother in Louisiana. After leaving the telephone booth, he was observed and chased by police officers whom he evaded. He stole another car in Mocksville and drove to Knoxville, Tennessee, where he took a bus to Memphis.

Thereafter, in an oral statement, also found by the court to have been made voluntarily, following the full Miranda warning, the defendant told these F.B.I. agents that after leaving Waxhaw with the body of the Parker boy in the car, he became stuck in a ditch due to snow; a motorist, passing by with his wife and several children, stopped and helped him to get out of the ditch; had the motorist observed the body of the Parker boy in the car, the defendant "would have had to kill the man and his family." He further stated to Agent Cooper that he felt no guilt at the murder of the young boy in Waxhaw, and that if he had the opportunity he would kill Agent Cooper.

On the evening of 11 February, Gwendolyn Blackmon gave to Sheriff Fowler of Union County a statement concerning the abduction, the rape, the murder and the theft of the Parker car which was essentially the same as her testimony in court, above summarized. She then accompanied Sheriff Fowler to and pointed out the place where the rape occurred and the launderette where the stabbing of the Parker boy occurred. At that time, she told the sheriff her assailant was "a black male, with a medium short bush, a mustache" and "a gold tooth with an emblem of a star in the center of it." The defendant has such a tooth.

Sheriff Fowler received the defendant from the federal officers in Memphis and returned him to North Carolina. After a voir dire, duly conducted, the court found as facts that the defendant was given the Miranda warning by the sheriff, signed a waiver of his right to counsel, was not under the influence of any intoxicating beverage or narcotic drug, was intelligent and well educated and that no promises or threats were made to him but that he freely and voluntarily and intelligently made a statement to Sheriff Fowler. Evidence on the voir dire examination supported these findings. The statement of the defendant to the sheriff was then admitted in evidence. It was to the following effect:

The defendant, a colored male born 4 October 1950, completed 12 grades in school. On 9 February 1973, he "escaped from Odom Prison." He went to Charlotte and on 11 February he saw "a small black girl" getting out of her car and told her to get back in. She "hollered" and he told her to shut up or he

would hurt her. She then got back in her car and he tied her hands behind her, told her to lie down in the car, which she did, and he drove away with her. After driving about 15 miles into the country, he told the girl he wanted her car and she could get out but she would not leave her car. He then drove onto a dirt road and parked and told the girl "if she made love" he would not hurt her. Thereupon, he had sexual relations with her. Driving on to Waxhaw, he observed a white boy sitting in a Grand Prix Pontiac car in front of a launderette. He told the girl he had to get another car, so he parked beside the Pontiac, went to the driver's side, told the boy he was having car trouble and asked the boy to help him. When the boy refused, the defendant pulled a "scout knife" from his belt and stabbed the boy twice, once in the upper chest and once in the shoulder. The boy was striking at the defendant when the defendant stabbed him. The wound in the chest killed the boy in two or three minutes. The defendant then told the girl to leave, which she did. Her name was Gwendolyn Blackmon. The defendant then got in the white boy's car and rode around for about 15 minutes before he became stuck in a ditch, from which a passing motorist pulled him. The defendant "was glad the people who pulled him out of the ditch didn't see the body" as he did not know what he might have done to them if they had done so. The defendant then put the body of the white boy in a ditch and drove on to Charlotte where he was chased by but eluded the police officers. Going on to Mocksville he stole another automobile which he drove to Knoxville, Tennessee. From there he took a bus to Memphis where he was arrested.

Attorney General Robert Morgan by Associate Attorney Maddox for the State.

Griffin and Humphries by James E. Griffin and Charles D. Humphries for defendant.

Adam Stein, Julius Levonne Chambers, Jack Greenberg, James M. Nabrit III, Jack Himmelstein, Peggy C. Davis and Anthony G. Amsterdam, attorneys for the NAACP Legal and Educational Fund, Inc., Amicus Curiae.

LAKE, Justice.

The principal thrust of the defendant's brief and the brief of the amicus curiae, in its entirety, are directed against the imposition of the death penalty for the crimes of first degree murder and rape. The defendant's remaining 125 assignments of error are directed to various rulings of the trial court which he contends entitle him to a new trial on all of the charges.

We do not reach the question of the validity of the judgments imposing the death penalty for first degree murder and for rape if the defendant is entitled to a new trial on these charges for the reason that he did not receive a fair trial in accordance with law. Therefore, we turn first to those 125 other assignments of error. Fifty of these are expressly abandoned by the defendant in his brief. Many of the others present the same question of law. Others are purely formal. Due to the gravity of the offenses charged and the punishments imposed, we have carefully considered the entire record and each assignment of error, including those abandoned, to determine whether the defendant is entitled to a new trial on any or all of the charges against him.

[1] Over the objection of the defendant, the State's motion to consolidate for trial the four charges (murder, rape, kidnapping and armed robbery) was granted and the defendant's motion for severance was denied. In these rulings there was no error.

G.S. 15-152 provides:

> "When there are several charges against any person for the same act or transaction or for two or more acts or transactions connected together, or for two or more transactions of the same class of crimes or offenses, which may be properly joined, instead of several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court will order them to be consolidated * * *."

The uncontradicted evidence is that the entire series of events comprising the four crimes with which the defendant is charged began at about 3:30 p.m., Eastern Standard Time, on 11 February 1973 and was concluded when it was just dark enough to require lights on automobiles. On that date, this would be approximately two and one-half hours. Obviously, the four offenses constituted a continuing criminal episode. See: *State v. Frazier*, 280 N.C. 181, 185 S.E. 2d 652; *State v. Turner*, 268 N.C. 225, 150 S.E. 2d 406; *State v. White*, 256 N.C. 244, 123 S.E. 2d 483; *State v. Chapman*, 221 N.C. 157, 19 S.E. 2d 250. They were so related in time and circumstance as to permit the admission in evidence of each in the trial of the others. *State*

v. Morrow, 262 N.C. 592, 138 S.E. 2d 245; *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364; *State v. Harris*, 223 N.C. 697, 28 S.E. 2d 232; Stansbury, North Carolina Evidence (Brandis Revision), § 91. Under these circumstances, the consolidation of the cases for trial was within the sound discretion of the trial judge. *State v. Yoes* and *State v. Hale*, 271 N.C. 616, 157 S.E. 2d 386.

[2] There was no error in the denial of the defendant's motions, heard before trial and in the absence of prospective jurors, for removal of the cases to another county for trial and, upon denial of that, for the summoning of a special venire from a county other than Union. The ground stated for each motion was that, due to the publicity in the various news media concerning these offenses and the resulting charges against the defendant, it would not be possible for him to obtain a fair and impartial trial in Union County by a jury composed of its residents. In support of his motion, the defendant offered affidavits and copies of stories appearing in newspapers published in Union County and in Charlotte. The State offered, in opposition, a number of witnesses who expressed the opinion that the defendant could receive a fair and impartial trial in Union County by a jury composed of its residents.

The newspaper stories were not inflammatory in nature. All were well within the normal limits of newspaper reporting of criminal activity. Their substance was as follows: On 9 February 1973, the defendant was serving a term in the Odom State Prison for two murders. While in prison, he became president of a chapter of the Junior Chamber of Commerce (Jaycees), organized within the prison. On 9 February 1973, he was permitted by the prison officials to leave the prison to attend a Jaycee convention in Raleigh, accompanied by a guard. In abuse of the confidence thus placed in him, he eluded the guard at the convention and escaped. Two days later, these criminal offenses occurred and the victim of the kidnapping and rape identified the defendant as the perpetrator of all four of them.

These circumstances attracted the attention of all the news media of the State. The defendant offered no evidence that such publicity was more widespread in Union County than in any other county to which the case might have been removed in accordance with G.S. 1-84. To hold that the defendant could not be tried in a county in which newspapers, carrying stories of

the offenses and charges, circulated would preclude trial in any county of the State.

As the defendant concedes, these motions were directed to the discretion of the trial court. *State v. Blackmon*, 280 N.C. 42, 185 S.E. 2d 123; *State v. Yoes* and *State v. Hale, supra; State v. Porth*, 269 N.C. 329, 153 S.E. 2d 10; *State v. McKethan*, 269 N.C. 81, 152 S.E. 2d 341. There is no indication whatever of abuse of discretion in their denial in the present instance. See: *State v. Blackmon, supra; State v. Brinson*, 277 N.C. 286, 177 S.E. 2d 398; *State v. Conrad*, 275 N.C. 342, 168 S.E. 2d 39.

[3] We observe, though the defendant did not raise the point, that the kidnapping occurred in Mecklenburg County. Thus, Mecklenburg County was the proper venue for the trial of that charge. Venue, however, may be waived by a defendant and is waived by his going to trial without requesting transfer to the proper county. *State v. Ray*, 209 N.C. 772, 184 S.E. 836; Strong, N. C. Index 2d, Criminal Law, § 15. The motion for change of venue on the ground of local prejudice is not such a request. Consequently, placing the defendant on trial in Union County is not ground for a new trial on the charge of kidnapping in this instance.

[4] The defendant next moved, prior to trial, that prospective jurors be questioned separately, out of the presence of other selected or prospective jurors. The ground was that this would avoid possibility that a prospective juror, in response to a question, might refer, in the presence of other prospective or previously selected jurors, to what he had read or heard through the news media concerning the defendant's being an escaped prisoner. This motion also was directed to the sound discretion of the trial judge. *State v. Bryant*, 282 N.C. 92, 191 S.E. 2d 745; *State v. Perry*, 277 N.C. 174, 176 S.E. 2d 729. There was no abuse of discretion in its denial.

[5] Forty-four assignments of error relate to questions propounded by the Solicitor to the prospective jurors as to their views concerning the death penalty. No material difference in these questions is suggested by the defendant and we perceive none. Consequently, these assignments will be discussed together. It is to be observed that these assignments relate, not to the sustaining of a challenge by the State but merely to a propounding of a question to the prospective juror. Obviously, prospective jurors may be asked questions which will elicit information not,

per se, a ground for challenge in order that the party, propounding the question, may exercise intelligently his or its peremptory challenges. *Swain v. Alabama*, 380 U.S. 202, 219, 85 S.Ct. 824, 13 L.Ed. 2d 759; *State v. Allred*, 275 N.C. 554, 169 S.E. 2d 833; *State v. Atkinson*, 275 N.C. 288, 308, 167 S.E. 2d 241; G.S. 9-15.

The interrogations to which these assignments of error are directed are typified by the following question propounded to prospective juror, Mrs. McWhorter:

> "Do you have any moral or religious scruples or beliefs against the imposition of the death penalty in certain cases?"

No challenge to a prospective juror was sustained upon an affirmative answer to this question alone. The defendant asserts that merely "to ask such a question violates the spirit of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed. 2d 776." We do not so construe either the letter or the spirit of the Witherspoon decision. We have held many times that there is no error in permitting questions to be propounded to prospective jurors concerning their views about the death penalty. *State v. Rogers*, 275 N.C. 411, 168 S.E. 2d 345; *State v. Yoes* and *State v. Hale*, *supra*, at p. 643; *State v. Spence*, 271 N.C. 23, 155 S.E. 2d 802. We consider below the effect of the Witherspoon decision upon rulings of the Superior Court sustaining challenges to prospective jurors following their responses to other questions propounded by the Solicitor.

[6] The defendant assigns as error the court's sustaining of the Solicitor's challenges to prospective jurors Baucom, Haigler, Mosley, Mrs. McWhorter and Mrs. Purser, contending that the allowance of such challenges for cause violated "the spirit of Witherspoon." There was no material difference in the questions and answers upon the basis of which these five challenges for cause were sustained. Those here quoted, directed to and given by prospective juror Baucom, after he had stated that he did not believe in the imposition of the death penalty, are typical:

> "Q. On account of that moral or religious scruple, or scruples would it be impossible under any circumstances and in any event for you to return a verdict of guilty of murder in the first degree and rape knowing at the time that the defendant would be sentenced to death?
>
> "A. Yes, sir, I couldn't do it.
>
> * * *
>
> "Q. If you were chosen to sit on this jury, are you saying that you would not under any circumstances give any consideration to returning a verdict which would involve the death penalty?
>
> "A. No, sir.
>
> "Q. That is what you are saying?
>
> "A. That is what I am saying, I couldn't do it."

The sustaining of the challenges for cause to these five prospective jurors, in view of their responses on voir dire, was not a violation of either the letter or the spirit of *Witherspoon v. Illinois, supra*. As the defendant concedes, these rulings were in accord with our decision in *State v. Sanders*, 276 N.C. 598, 174 S.E. 2d 487. They were also in accord with our similar rulings in *State v. Anderson*, 281 N.C. 261, 188 S.E. 2d 336; *State v. Watson*, 281 N.C. 221, 188 S.E. 2d 289; *State v. Frazier*, *supra*; *State v. Doss*, 279 N.C. 413, 183 S.E. 2d 671; *State v. Westbrook*, 279 N.C. 18, 181 S.E. 2d 572, and many other recent decisions.

[7] The defendant assigns as error the denial by the Superior Court of his motion for a mistrial due to a response by juror Larry McCoy to a question by the defendant before he was accepted as a juror. After Mr. McCoy had stated that he had heard about the case and probably had read it in the newspaper but had not seen it on television or heard it on radio, the interrogation proceeded as follows:

> "Q. At the time you read about it did you form an opinion as to this man's innocence or guilt?
>
> "A. Yes, sir.
>
> "Q. Do you still have that opinion?
>
> "A. No, sir.
>
> "Q. What stage did you cease to have it?
>
> "A. No answer.

"Q. You said you had formed an opinion as to his innocence or guilt but now you do not have it any longer. Did you just forget what you had read—

"A. Yes, sir. I didn't recall exactly what I had read now.

"Q. And you are saying that you cannot now recall what you read about this case?

"A. Not word for word. The main part that I remember was what stuck in my mine [sic], I believe he was declared an outlaw. Is that not true? That's the part that stuck in my mind."

"MR. GRIFFIN (counsel for defendant): I move for a mistrial, your Honor.

"COURT: MOTION DENIED. EXCEPTION.

"Q. Mr. McCoy, as you sit there now do you have an opinion as to this man's innocence or guilt?

"A. No, sir.

"Q. Could you take what you read as being evidence of his innocence or guilt?

"A. No, sir."

The defendant did not elect to challenge this juror for cause or peremptorily. He had not at that time exhausted his peremptory challenges. Mr. McCoy served on the jury.

This assignment of error is not directed to Mr. McCoy's service on the jury. It is directed to the denial of the defendant's motion for mistrial for his statement, in the presence of other prospective and selected jurors, that he remembered, he believed, having read that the defendant was declared an outlaw.

A mistrial is not lightly granted. The granting of the defendant's motion therefor rests largely in the discretion of the trial judge. *State v. Self*, 280 N.C. 665, 187 S.E. 2d 93; Strong, N. C. Index 2d, Criminal Law, § 128. We see no error in the denial of the motion in this instance.

[8] The court denied the defendant's challenge for cause to juror Frank Parker. The ground for challenge was that Mr.

Parker, a member of the special venire, drawn and summoned after the regular panel was exhausted, had seen a television news report about the case the night before he was called into the jury box. Nothing whatever in the record suggests the nature of the television newscast so heard, nor does it appear that Mr. Parker had been summoned for jury duty prior to listening to the newscast. The defendant interrogated Mr. Parker at considerable length and no information was developed indicating any prejudice against the defendant, any preconceived idea concerning his guilt of innocence, or other ground for challenge. After the conclusion of the defendant's interrogation of this juror, the court interrogated him as follows:

"COURT: I'd like to ask him a question. In view of the fact you heard something on the television last night about the trial, and this is the time when the jury is being selected, no evidence has been presented, do you feel that you can sit and hear the evidence as it comes from the witness stand and give this defendant a fair and impartial trial without being influenced in any way by what you previously heard?

"A. Yes, sir, I could.

"COURT: Including what you heard last night on the television?

"A. Yes, sir."

There was no error in denying the defendant's challenge for cause to this juror. *State v. Fox*, 277 N.C. 1, 175 S.E. 2d 561; *State v. DeGraffenreid*, 224 N.C. 517, 31 S.E. 2d 523.

Gwendolyn Blackmon, after testifying that the defendant, positively identified in court by her, kidnapped and raped her, testified that she saw him walk up to and stab, with his knife, a white boy sitting in a "1971 Grand Prix, yellow with a cream vinyl top," parked in the parking lot of a launderette (identified by her as the launderette in Waxhaw). She further testified that, as a result, blood gushed from the mouth and nose of the boy and the defendant got in the boy's car and, after shoving his body over into the passenger's seat, drove away. The boy so stabbed wore a cap similar in appearance to that found on the body of David Timothy Parker as it lay in a roadside ditch some five miles from the launderette.

The Parker boy's brother testified that he, himself, was the owner of such an automobile and had lent it that afternoon to

David Timothy Parker. This automobile was recovered that evening by police officers in Charlotte after the defendant, who was driving it, had fled from it. It was heavily blood stained, not having borne such stains at the time the owner lent it to David Timothy Parker. The cause of the Parker boy's death was a stab wound in the chest.

[9] Over objection, the brother of David Timothy Parker was permitted to testify that, when he borrowed the car and immediately before driving off in it, David Timothy Parker said he was going to the launderette in Waxhaw. The ground of the defendant's objection was that this was hearsay evidence, which, of course, it is. It is, however, within an exception to the hearsay rule noted by us in *State v. Vestal*, 278 N.C. 561, 581-590, 180 S.E. 2d 755. It was also admissible as part of the *res gestae* of the borrowing and departure. Annot., 163 A.L.R. 15, 21. If it were not admissible under either of these exceptions to the hearsay rule, its admission would be, at most, harmless error. The only effect of the evidence would be to tend to identify David Timothy Parker as the boy whom the defendant stabbed. As above noted, the other evidence in the case established this fact beyond controversy. There is no merit in this assignment of error.

[10] Officer Griffin of the Charlotte Police Department testified that on 11 February 1973 at approximately 9:00 p.m., he and another officer were patrolling in a police vehicle as a result of a call they had received. He observed the Parker automobile parked beside a telephone booth at a service station. In the booth was a Negro man. As they pulled into the parking lot for the purpose of questioning the man, he got in the car and drove off. They pursued him and at one point drew parallel with the other automobile on its left side. At that point the other car turned into the path of the police car and struck it, then speeding off.

Officer Griffin was seated in the passenger's seat of the police vehicle. Thus, he was immediately next to the driver of the other vehicle when the two cars were parallel and in collision. He testified that he had an opportunity to see the face of the driver of the other vehicle. The police officers continued the pursuit, bumping the Parker car several times in unsuccessful efforts to stop it. Finally, it slowed down and the driver jumped out and fled on foot. Officer Griffin pursued him on foot, drawing within ten feet of him. He unequivocally identified the defendant in court as the man who was driving the Parker car. To this evidence, there was no objection.

On cross-examination, Officer Griffin testified that he saw the defendant at a distance of about ten feet for four to five seconds while pursuing him on foot. There were street lights in the area. He then testified: "My indetification of that subject as being the defendant is not based on my observation of that driver for four to five seconds. I am basing my identification on pictures that I saw of the suspect. My identification is not based strictly on what I saw that night." Thereupon, the defendant's counsel moved to strike the officer's in-court identification of the defendant and the court conducted a voir dire examination of the officer.

On such voir dire, the officer testified that his identification of the defendant as the man he so pursued in Charlotte on the night of February 11, 1973 was based upon what he saw that night as he and his companion were chasing the car, that he saw photographs of the defendant later, but his in-court identification of the defendant as the man he so pursued was based "solely on my observation, seeing him in that car that night." He then described the appearance of the driver of the other vehicle as he saw him in the car and again identified the defendant as the man he then saw. Upon this evidence, the court overruled the motion to strike. In this ruling we find no error.

Although the trial judge should have made specific findings of fact following the voir dire, his overruling of the motion to strike, under the circumstances, necessarily implies the finding that the in-court identification by the witness was based on what the witness saw in the course of the pursuit of the other vehicle and its driver. The evidence is ample to support such finding. Furthermore, there is nothing whatever in the record concerning the nature of the pictures he saw later, or to indicate that these, or the circumstances under which he saw them, were impermissibly suggestive. The in-court identification had an independent origin. There is nothing to indicate a substantial likelihood of irreparable misidentification through the subsequent inspection of photographs. *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed. 2d 1247; *State v. Morris*, 279 N.C. 477, 183 S.E. 2d 634. Finally, as to this point, Officer Griffin's identification of the defendant, as the man he pursued, is corroborated by his finding of the defendant's coat on the ground at the point where the fleeing man jumped over

a fence and thus escaped. It is further corroborated by the defendant's own statement to Sheriff Fowler, discussed below.

The next three assignments of error are directed to the admission of statements made by the defendant to the agents of the Federal Bureau of Investigation who arrested and interrogated him.

Agent Phelps of the Federal Bureau of Investigation, who arrested the defendant in Memphis, Tennessee, testified concerning both an oral statement and a written statement given by the defendant to the witness as the result of in-custody interrogation. Before admitting this evidence, the court conducted voir dire examinations and made full findings of fact. He found that, before such interrogation, the F.B.I. agents conducting the interrogation gave the defendant the full warning required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694. He further found that the defendant signed a written waiver of his constitutional rights, including his right to have an attorney present at the interrogation, and that the defendant made the statements, oral and written, freely, voluntarily and intelligently. These findings, being fully supported by the evidence on the voir dire examination, are conclusive on appeal. *State v. Fox, supra; State v. Gray*, 268 N.C. 69, 79, 150 S.E. 2d 1; *State v. Barnes*, 264 N.C. 517, 142 S.E. 2d 344; *State v. Rogers*, 233 N.C. 390, 64 S.E. 2d 572. An in-custody confession is competent if made voluntarily after the defendant has been given proper warning of his constitutional rights and has full knowledge thereof. *State v. Chance*, 279 N.C. 643, 661, 185 S.E. 2d 227; *State v. Murry*, 277 N.C. 197, 176 S.E. 2d 738; *State v. Gray, supra.*

The defendant does not contend that the statements were not voluntary or that they were made without full knowledge of his constitutional rights. His contention is that it was error to permit Agent Phelps to read to the jury the written confession, consisting of five pages of detailed account of the defendant's activities from the abduction of Gwendolyn Blackmon to the arrest of the defendant in Memphis, because it includes the defendant's statement, "[W]hile I was attending a J.C. Day in the General Assembly in Raleigh, North Carolina, at the Hilton Inn, I walked away." It is his contention that this "shows escape and previous convictions," evidence of which would not be admissible.

As a matter of fact, the written confession also states that the defendant telephoned his mother in Louisiana and told her he had "escaped from prison" and that he told the woman, in whose house he was arrested in Memphis, that he "had just got out of prison."

Agent Phelps also testified that, in his oral statement, the defendant "told us that on February 9, 1973 that while he was in Raleigh attending a Jaycee meeting he walked away from the guards that were there." The defendant's contention on appeal is that this is also inadmissible evidence of his having committed some prior criminal offense. (At no time was there any evidence before the jury as to the nature of the prior offenses.)

[11] Finally, in this connection, the defendant assigns as error the denial of his motion for a mistrial for the reason that Agent Phelps testified, "We asked Mr. Jarrette if he would relate to us details surrounding the time of his escape until the time [of his arrest in Memphis]." Again, the contention of the defendant is that such testimony was inadmissible evidence to the effect that the defendant had committed previously some criminal offense. The circumstances of this ruling are disclosed by the record to have been as follows:

After the court had conducted the voir dire examination concerning the defendant's oral statement to the F.B.I. agents, and had ruled evidence thereof admissible, the jury returned to the courtroom and Agent Phelps resumed his testimony. The record shows the following took place:

> "Q. Thereafter, after the defendant placed his signature at or near the bottom of State's Exhibit 18 [the signed waiver of his constitutional rights], Mr. Phelps, what, if any, statement *did he make to you?* [Emphasis added.]
>
> "OBJECTION. OVERRULED.
>
> "Q. Go ahead.
>
> "A. At that time *we asked* Mr. Jarrette if he would relate to us details surrounding the time of his escape until the time—[Emphasis added.]
>
> "OBJECTION.
>
> "COURT: If he would relate to you what?
>
> "A. If he would relate to us the events that evolved from the time he had escaped until the time he was arrested.

"MR. GRIFFIN [defendant's counsel]: Move that that portion 'escaped' be stricken.

"COURT: You will not consider his statement as to 'escaped.'

"Q. Mr. Phelps, my question is what, if any, statement did he make, not what you said.

"MR. GRIFFIN: I'd like to get—

"COURT: You will not consider any statement that Officer Phelps made asking the defendant to relate the events subsequent to an escape.

"MR. GRIFFIN: I would like the record to show that I made a motion to a mistrial at this time.

"COURT: MOTION DENIED. EXCEPTION."

It is, of course, the general rule that upon the trial of a criminal charge, the defendant not having taken the stand as a witness, evidence of his bad character is not competent and, for this reason, the State may not introduce evidence showing that he committed an unrelated criminal offense. *State v. McClain, supra;* Stansbury, North Carolina Evidence (Brandis Revision), § 91. However, Agent Phelps' statement inferring that the defendant had escaped from prison was not responsive to the question propounded to him by the Solicitor. Immediately, upon motion of the defendant's counsel, the court properly instructed the jury not to consider this statement. We find in this circumstance no ground for a mistrial. *State v. Self, supra.*

[12] Thereupon, Agent Phelps, in response to the Solicitor's question, related to the jury the detailed, oral statement of the defendant to him, including the words, "[W]hile he was in Raleigh attending a Jaycee meeting he walked away from the guards that were there." At the conclusion of the witness' answer, the defendant made a motion to strike the entire answer, but not a motion to strike the statement that the defendant had walked away from the guards.

Again, when the defendant's written confession was introduced in evidence, there was a general objection only and, after it was read, a general motion to strike the entire answer. The court was not requested to strike or to instruct the jury to disregard the expressions therein that, while attending the Jaycee

meeting in Raleigh the defendant "walked away," that he telephoned his mother and told her he had "escaped from prison" and had told the woman, in whose home he was arrested in Memphis, that he "had just got out of prison."

The earlier ruling by the court, concerning Agent Phelps' non-responsive use of the word "escape," shows clearly that, had the defendant requested him to do so, the judge would have stricken from the written confession the above quoted words contained therein. Nothing in the record indicates that these particular expressions in the written document were called to the court's attention. The objection was to the introduction of the document in its entirety and the evidence on the voir dire examinations, conducted with reference both to the oral and to the written statements of the defendant to the officers, gave the court to understand that the defendant's objections were to the statements in their entirety and on the ground that they were impermissibly obtained, not to any specific words therein. "When testimony or a document is inadmissible only in part, the objection should specify the objectionable part; and if it is not so confined, it is not error to overrule it." Stansbury, North Carolina Evidence (Brandis Revision), § 27. In *Nance v. Telegraph Co.*, 177 N.C. 313, 98 S.E. 838, this Court said, "[W]here a part of testimony is competent, although the other part of it may not be, an exception is taken to all of it, it will not be sustained. * * * We will not set off the bad for him and consider only that much of it, upon the supposition that his objection was aimed solely at the incompetent part."

It will be observed that in these three assignments of error the defendant is not asserting that his constitutional rights have been denied or violated. He does not contend that the statements by him to the interrogating officers were involuntary, or that they were made without full knowledge of his constitutional rights. His contention is simply that, in these instances, evidence tending to show that he had previously committed some undesignated criminal offense was improperly placed before the jury. Under the circumstances, these assignments are without merit.

As the Supreme Court of the United States said in *Bruton v. United States,* 391 U.S. 123, 135, 88 S.Ct. 1620, 20 L.Ed. 2d 476, "Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every

trial where inadmissible evidence creeps in, usually inadvertently. 'A defendant is entitled to a fair trial but not a perfect one.' *Lutwak v. United States,* 344 U.S. 604, 619, 73 S.Ct. 481, 97 L.Ed. 593."

In *Schneble v. Florida,* 405 U.S. 427, 432, 92 S.Ct. 1056, 31 L.Ed. 2d 340, the Court, after referring to the above statement in the Bruton case, supra, said:

> "Thus, unless there is a reasonable possibility that the improperly admitted evidence contributed to the conviction, reversal is not required. * * * In this case, we conclude that the 'minds of an average jury' would not have found the State's case significantly less persuasive had the testimony as to Snell's admission been excluded. The admission into evidence of these statements, therefore, was at most harmless error."

In view of the detailed confession by the defendant and the testimony of Gwendolyn Blackmon, it is inconceivable that had the jury never heard these objectionable statements relating to the defendant's being an escaped prisoner, they would have rendered verdicts other than those which they did return.

Sheriff Fowler testified that after he returned the defendant to Union County, he also warned the defendant of his constitutional rights, in compliance with *Miranda v. Arizona, supra,* and the defendant signed another written waiver thereof, including his right to have counsel present at the interrogation. Thereafter, the defendant made an oral statement which the Sheriff reduced to writing but the defendant did not sign. Upon objection being interposed, the court conducted another full voir dire examination and thereafter made full findings of fact, fully supported by the evidence on the voir dire examination, to the effect that such statement was made voluntarily and intelligently, after the giving of the requisite warning concerning his constitutional rights. The court then overruled the objection to the testimony of the Sheriff concerning such statement. The Sheriff thereupon related to the jury the statement so given him by the defendant which included the following:

> "I, Henry Jarrette, escaped from Odom Prison February 9, 1973. I, Jarrette, was at the Jaycee Day in the General Assembly in Raleigh. I, Jarrette, escaped because of the prison conditions. After I escaped, I, Jarrette, went to Charlotte * * * ."

Here, again, the objection was general and the defendant's motion to strike was directed to the entire statement. The lengthy voir dire examination of Sheriff Fowler, prior to the introduction of this testimony, clearly indicates that the defendant's concern was directed to whether the statement was voluntary and made with knowledge of the defendant's constitutional rights. For the reasons above mentioned, this assignment of error also is without merit.

The court, in its charge to the jury, said:

> "You may believe all that a witness says or you may believe none. You are to weigh the evidence and find where the truth lies. * * * ."

[13] The defendant assigns this as error, saying the court should have charged, "You may believe all, *or any part,* or none of what a witness says." (Emphasis added.) While the instruction suggested by the defendant would have been correct, and an improvement upon that actually given, we do not think the jury was misled by the omission of the words "or any part." This was a technical omission, not substantial, and could not have affected the result. Consequently, the defendant is not entitled to a new trial on account of it. *State v. Ingland,* 278 N.C. 42, 178 S.E. 2d 577; *State v. Lee,* 277 N.C. 205, 176 S.E. 2d 765; *State v. Gatling,* 275 N.C. 625, 170 S.E. 2d 593. At the conclusion of its entire charge, the court asked counsel if any further instructions were requested. Both the Solicitor and counsel for the defendant replied in the negative.

[14] The record shows that the court, in its charge to the jury, said:

> "If the State has satisfied you from the evidence and beyond a reasonable doubt that on or about the 11th day of February, 1973, the defendant, after tying the hands of Gwendolyn Blackmon, carrying her from Charlotte into Union County, and showing her a hunting knife, that he took off her clothes and had sexual relations with her in the back seat of the car after placing her in the back seat by the use of force and without her consent and against her will, he would be guilty of rape."

The defendant assigns this as error, contending that under this instruction the jury might have found the defendant guilty of rape if the defendant put the girl in the back seat of the car

by the use of force and without her consent and against her will, even though the act of intercourse was not with force and was with her consent. It will be observed that the insertion of commas before and after the phrase "after placing her in the back seat" makes the charge, on this point, completely accurate. The court reporter's punctuation of the judge's charge, standing alone, is not sufficient evidence of error to warrant a new trial. In the immediately preceding paragraph of the charge, the judge fully and accurately defined the crime of rape. It is not conceivable that the jury was misled by the above quoted portion of the charge.

[15] The above defendant assigns as error the failure of the trial court to charge the jury that the defendant might be found guilty of assault with intent to commit rape or of assault on a female. There is no merit in this contention. These are lesser offenses included in the offense of rape. However, it is not necessary for the court to submit to the jury a lesser, included offense, or to instruct the jury thereon, where there is no evidence tending to show the defendant may be guilty of such lesser offense. *State v. Carnes*, 279 N.C. 549, 184 S.E. 2d 235; *State v. Murry, supra;* Strong, N. C. Index 2d, Criminal Law, § 115.

All of the evidence, including the statements given by the defendant to the arresting officers in Memphis and to Sheriff Fowler, shows completion of the act of sexual intercourse after the girl was abducted, with threats to injure her if she made an outcry, and transported, with her hands tied behind her back, to a lonely spot on a rural road where the act of intercourse was committed. The girl's testimony was that at all times the defendant exhibited to her, or had at hand, the knife with which he subsequently stabbed the Parker boy to death. The defendant's own statements were to the effect that he told her that *if she submitted*, he would not hurt her. There is no evidence whatever that she yielded except through fear of serious injury. Under these circumstances, it was not error to fail to charge the jury concerning the lesser included offenses and to instruct them that on the charge of rape they might return a verdict of guilty of rape or a verdict of not guilty. *State v. Bryant*, 280 N.C. 551, 556, 187 S.E. 2d 111; *State v. Carnes, supra;* Strong, N. C. Index 2d, Criminal Law, § 115.

[16] There was likewise no error in the court's failure to submit to the jury the question of the defendant's guilt of second

degree murder, and to instruct the jury thereon. All of the evidence, including the statements by the defendant to the arresting officers and to Sheriff Fowler, is to the effect that the defendant stabbed and killed David Timothy Parker for the purpose of stealing the automobile in which the Parker boy sat and in the accomplishment of that purpose. The larceny of the automobile under these circumstances was robbery. G.S. 14-87; *State v. Bailey*, 278 N.C. 80, 178 S.E. 2d 809. A murder committed in the perpetration of a robbery is murder in the first degree. G.S. 14-17. *State v. Rich*, 277 N.C. 333, 177 S.E. 2d 422. The evidence, furthermore, shows clearly that the killing of the Parker boy was with premeditation and deliberation. There being no evidence whatever of a lesser degree of homicide, it was not error for the court to fail to instruct the jury concerning the lesser degrees of homicide and to instruct them that, on the charge of murder, they might return a verdict of guilty of murder in the first degree or a verdict of not guilty.

The defendant's remaining assignments of error, relating to the denial of his motions for nonsuit as to each of the charges, to instructions of the court to the jury and to rulings and procedures prior to the entry of the judgments, have all been carefully examined, whether abandoned by the defendant in his brief or not. There is no merit whatever in any of them. It would serve no useful purpose to discuss them individually. The verdicts of guilty of kidnapping, rape, murder in the first degree and armed robbery are each fully supported by the evidence. The record shows that the defendant received, on each charge, a fair trial in accordance with the law of this State. The record discloses no basis for disturbing any of the verdicts or the granting of a new trial upon any of the four charges.

We are thus brought to the defendant's principal contention, the sole contention of the amicus curiae, that even though the defendant received a fair trial, free from error, and, consequently, stands properly convicted of murder in the first degree and of rape, it was error to enter judgments on these charges sentencing him to death, and so, in Case No. 73CR1342 (murder) and Case No. 73CR1339 (rape), the judgments entered should be vacated and the cases remanded for judgments sentencing the defendant to imprisonment for life.

It will be noted that this assignment of error has no relation to the judgment imposing a sentence to imprisonment for life in

Case No. 73CR2843 (kidnapping). It will also be noted that in Case No. 73CR1341 (armed robbery) prayer for judgment was continued, this offense having been used by the State as an element of the crime of murder in the first degree.

In *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346, the Supreme Court of the United States held that the Eighth and Fourteenth Amendments to the Constitution of the United States forbid a state to inflict the penalty of death if, under the law of the state, either the jury or the judge is permitted, as a matter of discretion, to choose between the imposition of the death penalty and the imposition of the penalty of imprisonment. Each of the nine Justices, five concurring in the decision and four dissenting therefrom, wrote a separate opinion. The five Justices concurring in the decision did not agree, among themselves, as to the basis upon which the decision rests.

It is neither the function nor the purpose of this Court to defend or justify Furman, the stated reasons for it or the results which have flowed from it. Our function and intent has been, and is, to comply with it and to determine its effect upon the statutes of North Carolina, which expressly provide what penalty is to be imposed upon a defendant lawfully convicted of first degree murder, rape, first degree burglary or arson. G.S. 14-17, G.S. 14-21, G.S. 14-52, and G.S. 14-58.

Pursuant to Furman, we have received from the Supreme Court of the United States, and have complied with, mandates to vacate sentences of death affirmed by us prior to that decision. *State v. Frazier*, 283 N.C. 99, 195 S.E. 2d 33; *State v. Miller*, 281 N.C. 740, 190 S.E. 2d 841; *State v. Hamby and Chandler*, 281 N.C. 743, 191 S.E. 2d 66; *State v. Chance, supra; State v. Westbrook, supra; State v. Doss*, 281 N.C. 751, 191 S.E. 2d 70. In other cases, reaching this Court after the decision in Furman, involving offenses committed prior to our decision in *State v. Waddell*, 282 N.C. 431, 194 S.E. 2d 19, we have, in conformity thereto, vacated death sentences, and, having found no error in the trial, remanded the matters to the Superior Court for the imposition of sentences to life imprisonment. *State v. Blackmon*, 284 N.C. 1, 199 S.E. 2d 431; *State v. Watkins*, 283 N.C. 504, 196 S.E. 2d 750; *State v. Waddell, supra; State v. Carter*, 282 N.C. 326, 193 S.E. 2d 85. See also: *State v. Gurley*, 283 N.C. 541, 196 S.E. 2d 725; *State v. Washington*, 283 N.C.

175, 195 S.E. 2d 534; *State v. Talbert*, 282 N.C. 718, 194 S.E. 2d 822.

Prior to 1949, the imposition of a sentence to death was mandatory, in this State, upon a conviction of first degree murder or rape. In 1949, the Legislature inserted a proviso in the statutes relating to the punishment of first degree murder and rape, similar provisions having been inserted earlier into the statutes relating to first degree burglary and arson. As so amended, G.S. 14-17 (relating to murder), at the time of Furman read:

> "A murder * * * which shall be committed in the perpetration or attempt to perpetrate any * * * robbery * * * shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury."

G.S. 14-21 (relating to rape), as so amended, was to the same effect, so far as punishment is concerned.

At the time *Furman v. Georgia, supra*, was decided, this Court had held in numerous decisions that the effect of the proviso, inserted into these statutes by the 1949 amendment, and the effect of the like provisos previously inserted in G.S. 14-52 (burglary) and G.S. 14-58 (arson), was to confer upon the jury in each case the absolute, "unbridled" discretion to fix the punishment at either death or imprisonment for life. *State v. Manning*, 251 N.C. 1, 110 S.E. 2d 474; *State v. Denny*, 249 N.C. 113, 105 S.E. 2d 446; *State v. Conner*, 241 N.C. 468, 85 S.E. 2d 584; *State v. Simmons*, 234 N.C. 290, 66 S.E. 2d 897; *State v. McMillan*, 233 N.C. 630, 65 S.E. 2d 212; *State v. Shackleford*, 232 N.C. 299, 59 S.E. 2d 825; *State v. Mathis*, 230 N.C. 508, 53 S.E. 2d 666. This, Furman held, the State may not do by reason of the Eighth and Fourteenth Amendments to the Constitution of the United States.

The question was therefore presented, as a result of *Furman v. Georgia, supra*. What part of G.S. 14-17 (murder) and what part of G.S. 14-21 (rape), if any, remains the law of North Carolina? That question came before this Court and was determined by us in *State v. Waddell, supra*.

While the decision in *State v. Waddell, supra,* was not unanimous, no member of this Court took the view that Furman invalidated G.S. 14-17 or G.S. 14-21 in its entirety. All of the members of this Court agreed that, notwithstanding Furman, these statutes remain in the law of North Carolina, in part, and only in part. The difference of opinion among the members of this Court was as to which part of each such statute remained the law of this State, the original provision making death the mandatory punishment, or the proviso, added by the 1949 amendment, which attempted to confer upon the jury the discretion forbidden by Furman. It was the view of the majority of this Court that the portion of each of these statutes which survived Furman, and remained the law of North Carolina, was the original provision making the death penalty mandatory and *State v. Waddell, supra,* so decided. The Supreme Court of Delaware reached the same conclusion as to the effect of *Furman v. Georgia, supra,* upon the similar statutes of that State. *State v. Dickerson* (Del.), 298 A. 2d 761.

To avoid another, and different, serious question of constitutional validity, should we give *State v. Waddell, supra,* retroactive effect, we there held that our decision would not be retroactive and that, consequently, the death penalty would be imposed only in cases where the offense was committed after the date of that decision (18 January 1973). To the same effect, see *State v. Dickerson, supra.*

[17] The reasons for our decision in *State v. Waddell, supra,* are fully set forth in the opinions therein and need not be recounted here. Having given full consideration to the brief and oral argument of the defendant and to the brief of the amicus curiae, requesting us to reconsider *State v. Waddell, supra,* we now reaffirm that decision and hold that the meaning of G.S. 14-17, G.S. 14-21, G.S. 14-52, and G.S. 14-58, in the light of the decision of the Supreme Court of the United States in *Furman v. Georgia, supra,* is that a defendant, lawfully convicted of first degree murder, rape, first degree burglary or arson, the offense having been committed after 18 January 1973, must be sentenced to death, the trial judge having no discretion in the matter of the sentence to be imposed and the jury having no authority to fix a different punishment.

[18] The determination of what the statutes of this State mean, with reference to the punishment to be imposed for criminal

offenses, is a question of State law and the determination thereof by this Court is authoritative. It is not a Federal question. *Adderly v. Florida,* 385 U.S. 39, 46, 87 S.Ct. 242, 17 L.Ed. 2d 149, reh. den., 385 U.S. 1020, 87 S.Ct. 698, 17 L.Ed. 2d 559; *Shuttlesworth v. Birmingham,* 382 U.S. 87, 86 S.Ct. 211, 15 L.Ed. 2d 176.

Having determined that the defendant has been lawfully and fairly convicted of first degree murder and of rape and having determined that G.S. 14-17 and G.S. 14-21 require a defendant so convicted to be sentenced to death, the question then becomes whether the imposition of such sentence in this case violates any provision of the Constitution of North Carolina or of the Constitution of the United States.

[19] The Constitution of North Carolina, Article XI, §§ 1 and 2, expressly permits the imposition of the death penalty upon conviction of first degree murder or upon the conviction of rape. The meaning of the State Constitution is also a matter of State law upon which the decision of this Court is final.

The contention of the defendant, and of the amicus curiae, is that a State statute, which makes it mandatory that a defendant, fairly and lawfully convicted of first degree murder or of rape, be sentenced to death, violates the Eighth and Fourteenth Amendments to the Constitution of the United States.

Furman v. Georgia, supra, does not so hold, only two of the nine Justices (Mr. Justice Brennan and Mr. Justice Marshall) indicating such a view in their opinions in that case. No other decision of the Supreme Court of the United States so holds. This is, of course, a Federal question and our determination of it is subject to review by the Supreme Court of the United States, but we must make the initial determination and must do so in the light of decisions heretofore rendered by that Court.

The arguments of the defendant and of the amicus curiae, in support of their position on this question, may be summarized as follows: (1) Although G.S. 14-17 (murder) and G.S. 14-21 (rape), as construed in *State v. Waddell, supra,* make the imposition of the death sentence mandatory upon conviction of first degree murder or rape, the death penalty is nevertheless discretionary and selective because (a) the Solicitor has the power to prosecute for a lesser charge, (b) the jury has the power to acquit or to convict of a lesser charge, and (c) the

Governor has the power to commute the sentence or grant a pardon; (2) since our decision in *State v. Waddell, supra,* the death sentence has been imposed in North Carolina more frequently than was the case prior to the decision in *Furman v. Georgia, supra,* from which it is concluded that our construction of these statutes is contrary to the legislative intent; (3) nevertheless, since *State v. Waddell, supra,* was decided, the death penalty has been imposed in such a small number of cases that its imposition is clearly selective and arbitrary; (4) the defendants sentenced to death since *State v. Waddell, supra,* was decided are predominantly non-white; (5) death is a cruel and unusual punishment because an "enlightened" public opinion has overwhelmingly repudiated it; (6) the punishment of death is both cruel and futile.

Although the mere statement of these contentions, in clear and simple terms, seems sufficient to show their lack of substance, the seriousness with which they are advanced impels us to take note of each of them briefly.

(1) The Death Penalty Is Discretionary And Selective.

[20] As is true of any other criminal charge, a murder case or a rape case begins with someone notifying police officers that the offense has occurred. As the result of ensuing police investigation, the person charged is arrested and, in due time, the matter comes to the attention of the Solicitor. It is his duty to evaluate the information and determine whether to seek an indictment and, if so, for what offense. It is not the Solicitor's duty to seek the indictment or the conviction of the innocent, or to seek the conviction of a person, guilty of one crime, upon another and more serious charge of which he is not guilty. It is elementary and fundamental that a defendant is not be convicted unless his guilt is established beyond a reasonable doubt. The decision of the Solicitor as to the offense for which he will seek an indictment from the grand jury and his decision as to whether to accept, with the permission of the court, a plea to a lesser charge, included within the offense specified in the indictment returned, are the results of an evaluation of the available evidence, including its credibility. The Solicitor's decision to charge a defendant with a crime, punishable by death if he is convicted, is a solemn one, properly reached only when, in the Solicitor's judgment, the evidence of guilt is clear and convincing. This is a human evaluation. There is often room

for difference of opinion concerning it. To say, as does the brief of the amicus curiae, that because the Solicitor determines in many cases that he should seek a conviction of a lesser offense, his decisions to seek convictions on capital charges in other cases are "feakish" is a patent absurdity, unjust to the skilled and honorable attorneys who hold and have held the high office of Solicitor in this State.

The purpose of vesting the power of judgment in an official is to enable him to make different decisions in different cases in the light of what he determines to be materially different factual situations. All governmental actions are based on this delegation of responsibility. The Fourteenth Amendment to the Constitution of the United States does not require a state, in the enforcement of its criminal laws, so to hedge its prosecuting attorney about with "guidelines" that he becomes a mere automation, acting on the impulse of a computer and treating all persons accused of criminal conduct exactly alike. From the foundation of the country to the present date, the discretion, now complained of by the amicus curiae, has been vested in prosecuting officers throughout the country. Without it, the greatest injustices would necessarily be inflicted upon innocent persons accused of crime.

The suggestion by the amicus curiae that the death penalty is unconstitutional because in many cases, in which the prosecuting attorney seeks the death penalty, the jury acquits the defendant altogether or convicts him of a lesser, included offense, has, if possible, even less plausibility. Article I, § 24, of the Constitution of North Carolina requires a trial by jury in all such cases. The Sixth Amendment to the Constitution of the United States contains a like provision. Obviously, the possibility of different verdicts by different juries in different cases upon different evidence was not believed by the framers of these constitutional provisions to be a sound reason for denying a state the power to impose an otherwise lawful penalty upon one found guilty by the jury which tried him, he having had a fair trial in accordance with the applicable law. *State v. Yoes* and *State v. Hale, supra,* at p. 631.

It is quite true that Article III, § 5(6), of the Constitution of North Carolina gives to the Governor of this State the authority to commute a death sentence imposed upon any defendant, or to grant to such defendant an absolute pardon, and to refuse to disturb such sentence imposed upon a different de-

fendant. Article II, § 2, of the Constitution of the United States confers a like power upon the President. So far as we have been able to determine, a like power is vested in the Governor, or some other official of the Executive Department, in each of our states. This power has existed and has been exercised repeatedly by the Governors of every state and by the President of the United States from the birth of our country. If its existence and frequent exercise makes the imposition of the death penalty unconstitutional per se, the nine Justices of the Supreme Court of the United States wasted a great deal of thought and much paper in *Furman v. Georgia, supra.* None of them so suggested in that case.

We reject categorically the contention of the amicus curiae that "the inevitable result of the North Carolina system of commutation is that an arbitrarily selected number of those convicted of like crimes will be put to death." The Governor exercises his judgment after investigatio.. of the record of the trial and other circumstances, including subsequently discovered evidence. This Court reviews the rulings of the trial judge. The Governor reviews the decision of the jury, which we may not do. The exercise by one Governor of this judgment, resulting in the commutation of the sentence of one man convicted of murder or rape and the refusal to commute the sentence of another convicted of such crime, cannot be called "freakish" or "arbitrary" merely because another Governor might, theoretically, have reached opposite conclusions.

The Equal Protection Clause of the Fourteenth Amendment makes no distinction between sentences to death and sentences to imprisonment. The Due Process Clause of that amendment protects liberty as well as life. The discretion in the Solicitor, in the jury and in the Governor, of which the amicus curiae complains, extends also to con-capital cases. If the existence of these discretionary powers makes the imposition of the death penalty unconstitutional, it would also make unconstitutional all prison terms, however long or short. Quite obviously, this is not the kind of discretion which the Supreme Court of the United States held impermissible in *Furman v. Georgia, supra.*

(2) *The Number Of Death Sentences Imposed Since State v. Waddell, Supra, Shows That Decision Was Contrary To The Intent Of The Legislature.*

[21] This argument has no relation to the constitutionality of the death penalty. Our decision in *State v. Waddell, supra,* was announced 18 January 1973. It was well publicized. Bills were promptly introduced in the 1973 Session of the Legislature to counteract it and to abolish the death penalty. Obviously, this was within the authority of the Legislature. North Carolina Constitution, Article XI, § 2. Those bills failed to pass. This is a clearer indication of the intent of the Legislature than is a statistical comparison of death sentences imposed per year prior to *Furman v. Georgia, supra,* and subsequent to *State v. Waddell, supra.*

It is but natural that more death sentences per year will be imposed under a mandatory statute than under one giving the jury discretion as to the penalty. While the 1973 Session of the Legislature did not have before it statistics now available, it could hardly have supposed that the number of death sentences would not increase, at least until the fact that the death penalty is the lawful punishment in North Carolina for first degree murder, rape, first degree burglary and arson becomes known to those inclined to commit such offenses.

It is also perfectly obvious that it was the hope of the 1949 Session of the Legislature to reduce the number of death sentences imposed for murder and rape. Unfortunately, the statutory device which it adopted to effectuate such intent was held by the Supreme Court of the United States to be beyond the power of the Legislature. *Furman v. Georgia, supra.* By that determination, we are bound.

(3) *The Small Number Of Death Sentences Imposed Since State v. Waddell, Supra, Shows The Death Penalty Is Imposed Arbitrarily.*

[22] Having first contended that too many have been sentenced to death since *State v. Waddell, supra,* the amicus curiae here contends that the number is too small. *State v. Waddell, supra,* held the death penalty could be imposed under G.S. 14-17 (murder), G.S. 14-21 (rape), G.S. 14-52 (first degree burglary), or G.S. 14-58 (arson) only for offenses committed after 18 January 1973. There is, unavoidably, some time lag between the commission of an offense and the trial and sentencing of the offender.

As of 14 January 1974, virtually one complete year since our decision in *State v. Waddell, supra,* twenty-one persons,

including the present appellant, have been sentenced to death in North Carolina for crimes committed after the decision was announced, three being co-defendants charged with the rape of the same victim. The present appellant was the first person so to be sentenced and his is the first appeal from those so sentenced to reach this Court. It has, therefore, not yet been finally determined whether any or all of the remainder were tried and sentenced pursuant to law. Of all the twenty-one, thirteen were convicted of first degree murder only, one (the defendant) was convicted of first degree murder and of rape, five were convicted of rape only, one of first degree burglary only and one of first degree burglary and of rape.

We are not advised by the defendant or by the brief of the amicus curiae as to how many individuals were brought to trial in North Carolina during this twelve-month period on capital charges and no statistics on that matter are available to us. Consequently, we do not have before us the number acquitted or the number convicted of lesser, included offenses. If we had such statistical data, it would neither establish nor disprove the contention that the twenty-one sentenced to death were arbitrarily selected. Arbitrary discrimination cannot be shown from statistical data. It requires, at least, careful study of the records in cases where different results were reached in order to determine whether those differences in result were justified by differences in the facts. What we do know is that all defendants *convicted* of first degree murder or of rape, committed since 18 January 1973, have been sentenced to death. The contention of arbitrariness is, therefore, not established.

(4) *Those Sentenced To Death Since State v. Waddell, Supra, Are Predominantly Non-White.*

[23] The present record is completely silent as to the racial composition of the grand jury which indicted this defendant and the petit jury which found him guilty. We are quite certain that had there been no members of the defendant's race thereon, or had there been the slightest suggestion otherwise of racial discrimination in the selection of either the grand jury or the petit jury, the defendant and the amicus curiae would not have left us in ignorance thereof. We do know from our own repeated investigation and study of the matter in other cases in recent years that there is no substantial or widespread racial discrimination in the slection of grand or petit jurors in this State.

Consequently, we cannot predicate a conclusion that North Carolina juries are, or in recent years have been, more inclined to convict guilty Negroes than guilty white defendants, of crimes for which the death penalty is imposed, on nothing save an assertion to that effect by "enlightened" opponents of the death penalty and a statistical tabulation of convictions classified by race.

Five of the twenty-one individuals sentenced to death in the twelve months since *State v. Waddell, supra,* was announced are white, one is an Indian and fifteen are Negroes. Of the five white men, three were convicted of murder in the first degree, one of burglary in the first degree and of rape and one of rape only. Their appeals have not been heard. As above shown, we have nothing before us or available to us to show how many white defendants or how many Negro defendants, charged with the commission of a capital offense during this twelve-month period, were brought to trial and acquitted or convicted of a lesser, included offense.

Courts can deal only with individuals brought before them on charges of criminal acts. Neither the defendant nor the amicus curiae shows or even suggests that the police officers of North Carolina have discriminated between white and Negro individuals so charged in the matter of arrest or investigation. We know of no provision in the Constitution of the United States which require police officers, having arrested a Negro rapist or murderer, to arrest no more Negroes so charged until a quota of white murderers and rapists, proportionate to the racial distribution of the population, has been so charged and arrested. Nor are we aware of any provision in the Constitution which requires prosecuting attorneys to defer bringing defendants of one race to trial until members of the other race have been tried for such offenses in proportion to the respective racial population in the area. The experience of this twelve-month period demonstrates clearly that North Carolina juries can and will convict white defendants of capital crimes and North Carolina judges will sentence them to death upon such conviction.

The record of this Court establishes beyond question that such sentences have been, and will be, affirmed when the defendant has had a fair trial in accordance with law. In the seven years the writer of this opinion had been a member of this Court prior to *Furman v. Georgia, supra,* there were before it ap-

peals by twenty-six defendants sentenced to death. Sixteen were Negroes, nine were white and one was an Indian. One was a woman. Ten of the twenty-six were granted new trials by this Court, apart from any action of the Supreme Court of the United States. Of those ten, eight were Negroes and two were white. Thus, of the sixteen death sentences, affirmed by this Court in the seven years prior to *Furman v. Georgia, supra,* eight were imposed upon Negro defendants, seven upon white defendants and one upon an Indian. In those cases, each record was carefully reviewed by each member of this Court, over and beyond the reviews required by the formal assignments of error, just as has been done in the present case. In each of those cases, just as in the present case, the record revealed a cruel, brutal murder or rape, or both, with no extenuating circumstance. Nothing whatsoever in the record of any of those cases, or in the record of this case, offers the slightest justification for the statement, or the suspicion, that the juries of this State have been affected by the race of the defendant in their determination that those defendants, or the present defendant, should be executed. Nothing whatsoever in those records, or in the present record, justifies the suggestion, or a suspicion, that the death sentence in any of those cases, or in this one, was "freakishly" imposed or "freakishly" affirmed.

(5) *Death Is A Cruel And Unusual Punishment Because An "Enlightened" Public Opinion Has Overwhelmingly Repudiated It.*

[24] The brief of the amicus curiae does not define its term, "enlightened." The implication, reasonably drawn from it, is that an "enlightened" person is one who opposes the death penalty. Only on his hypothesis can the statement that "enlightened" public opinion has repudiated the death penalty be found true.

Since *Furman v. Georgia, supra,* was decided on 29 June 1972, according to the brief of the amicus curiae, twenty states, scattered over the entire country, have reinstated capital punishment by legislation. In addition to our own decision in *State v. Waddell, supra,* Delaware has retained the death penalty by judicial decision, holding its "Mercy Statute" severable from its earlier "Murder Statute." *State v. Dickerson, supra.* Thus, there are now twenty-two states which have made some provision, since Furman, to inflict the death penalty for one or more offenses.

According to the dissenting opinion of Mr. Justice Powell in *Furman v. Georgia, supra,* at p. 417, approximately six hundred individuals were in state and Federal prisons, throughout the country, under sentence of death at the time Furman was decided. Many others, including six in North Carolina (one under two death sentences) had had their death sentences reduced to life imprisonment just a short time earlier, by virtue of the decisions of the Supreme Court of the United States in *United States v. Jackson,* 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed. 2d 138, and *Pope v. United States,* 392 U.S. 651, 88 S.Ct. 2145, 20 L.Ed. 2d 1317. (See: *State v. Childs,* 280 N.C. 576, 187 S.E. 2d 78; *State v. Roseboro,* 279 N.C. 391, 183 S.E. 2d 108; *State v. Sanders,* 279 N.C. 389, 183 S.E. 2d 107; *State v. Williams,* 279 N.C. 388, 183 S.E. 2d 106; *State v. Atkinson,* 279 N.C. 386, 183 S.E. 2d 106; *State v. Atkinson,* 279 N.C. 385, 183 S.E. 2d 105; *State v. Hill,* 279 N.C. 371, 183 S.E. 2d 97.) As above noted, twenty-one have received sentences of death in this State since 18 January 1973.

The present record shows that fifty prospective jurors were examined by the State. Of these, five were challenged by the State for cause, due to their expressed unwillingness to return a verdict which would necessitate the imposition of the death penalty under any circumstances. Seven others were challenged peremptorily by the State. Assuming that all of these peremptory challenges were due to the Solicitor's misgivings concerning the views of the prospective jurors as to the death penalty, this record shows that only twenty-four per cent of those called for jury service in this case, in Union County, believed that in no case should the death penalty be imposed.

It is thus quite clear, both throughout North Carolina and throughout the nation, that there is widespread opinion that the death penalty is the appropriate punishment for certain crimes. We do not accept the pronouncement by the amicus curiae that this widespread opinion, held by legislators, judges and jurors, is "unenlightened."

(6) *The Punishment Of Death Is Both Cruel And Futile.*

The severity of the death penalty is obvious. For that reason, it has been, and should be, imposed only for the most serious crimes and only when the defendant's guilt of such an offense has been established beyond reasonable doubt.

[25] The amicus curiae contends that to inflict the death penalty for any crime is futile because such penalty is not the most effective means for obtaining the goals of criminal punishment which it says are: (1) Retribution, (2) moral reenforcement or reprobation, (3) isolation of the offender, (4) reformation and rehabilitation of the offender, and (5) deterrence.

Like Mr. Justice Stewart, in his opinion in *Furman v. Georgia, supra,* at p. 308, we "cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment." The reasonable certainty, or even likelihood of a punishment commensurate with the offense, imposed by the State, is more likely to deter private effort by the family and friends of the victim to "balance the account," than is a policy of correction designed to release the offender in society as soon as possible.

The amicus curiae acknowledges that "moral reenforcement or reprobation doubtless requires that the most serious crimes be punished most seriously." If so, the death penalty is not futile so far as the attainment of this goal is concerned.

"Isolation of the offender" apparently means prevention of further crime by him. The death penalty is certainly not futile in the attainment of this objective.

Reformation and rehabilitation of the offender is obviously cut off by his execution. The present defendant, however, is not a promising prospect for rehabilitation by human punishment of any sort. Before going to trial, he was committed to one of the State hospitals for the insane for the purpose of an examination into his sanity. He was returned for trial with the report, "Without Psychosis (Not Insane)." That evaluation of his mind is not challenged. It is not contended by the appellant or by the amicus curiae that this defendant is lacking in intelligence. Prior to the offenses with which we are now concerned, the defendant was convicted of the murders of two other persons by stabbing them. For these offenses he was imprisoned for a term of years. While serving that sentence, he was permitted to join a national civic society, the Junior Chamber of Commerce, and became the president of a chapter of this society organized within the prison. He was permitted to leave the prison so as to attend a State convention of this organization. He took advantage of this leniency and escaped. Two days later, within a space of less than three hours, he abducted and raped a girl of his own race,

whom he had never seen before, and stabbed to death a complete stranger, a teenager sitting quietly in a parked car, for the sole purpose of stealing the automobile. He callously drove off with the dying boy and abandoned his body in a roadside ditch. When arrested four days thereafter by agents of the Federal Bureau of Investigation, he was carrying, concealed, on his person, another deadly knife, and his only expression of regret was that he had not had an opportunity to kill the arresting officer. The evidence is not convincing that another term in prison would be more efficacious in rehabilitating this defendant.

Whether the imposition of the death penalty in such a case will be futile in deterring others from like acts is, necessarily, a matter of opinion, upon which reasonable minds may and do differ. The steadily rising tide of crimes of the most serious nature, throughout the nation, has occurred in an era of unprecedented permissiveness in our society and of emphasis on sympathy for the accused rather than for his victim and those endangered by him. This is ample basis for reasonable men to conclude that some punishment of exceptionally vicious crimes, other than imprisonment coupled with carefully organized programs for rehabilitation designed to assure the prisoner that he has the sympathy of society, is necessary to bring about the turning of the tide.

Through recent years, the efforts of North Carolina actually to impose capital punishment in the most flagrant instances of vicious crime have been blocked by mandates of the Supreme Court of the United States stemming from *Furman v. Georgia, supra, United States v. Jackson, supra, and Pope v. United States, supra.* We, therefore, do not have recent experience which would support or disprove the contention of the amicus curiae that the carrying out of the death sentence in this instance would be less effective than imprisonment as a means of deterring others from like acts.

It is not, however, the function of this Court to determine the most efficacious punishment for the crimes of murder in the first degree and of rape. That is the function of the Legislature. Nothing in the Constitution of the United States requires that the Legislature prescribe the most efficacious punishment for crime, or even the one favored by "enlightened" sociologists. It is sufficient that reasonable men can believe that the punishment prescribed is reasonably adapted to the attainment of the

goals of all criminal punishment. In our opinion, G.S. 14-17 and G.S. 14-21, as construed by us in *State v. Waddell, supra,* meet this constitutional standard.

We, therefore, reject the contentions of the defendant and of the amicus curiae that the imposition of the death penalty for the crimes of first degree murder and rape is, per se, a violation of the Eighth and Fourteenth Amendments to the Constitution of the United States.

No error.

Chief Justice BOBBITT, with whom Justices HIGGINS and SHARP join, dissenting as to death sentences.

State v. Waddell, 282 N.C. 431, 194 S.E. 2d 19, was decided 18 January 1973. *All* members of this Court agreed, as stated in the majority opinion, that "the *Furman* decision [*Furman v. Georgia,* 408 U.S. 238, 33 L.Ed. 2d 346, 92 S.Ct. 2726, decided 29 June 1972] holds that the Eighth and Fourteenth Amendments will no longer tolerate the infliction of the death sentence if either judge or jury is permitted to impose that sentence as a matter of discretion." 282 N.C. at 439, 194 S.E. 2d at 25. Waddell's death sentence was *vacated* and his case remanded to the superior court for a judgment of life imprisonment.

All of us agreed that *Furman* required this disposition of Waddell's case. However, the majority opinion stated that for crimes of first degree murder, rape, first degree burglary, and arson, committed after 18 January 1973, the date of the *Waddell* decision, punishment by death would be mandatory. In accord with that statement, the majority sustain the death sentences herein. Three of us dissented in *Waddell* and now dissent from that view of the law. We were and are of the opinion that the impact of *Furman* upon our statutes is *to prohibit*—not to require or permit—*the imposition of death sentences until such time as our statutes are amended by the General Assembly.*

The statutes enacted by our General Assembly provide that a person convicted of first degree murder, G.S. 14-17, or of rape, G.S. 14-21, or of first degree burglary, G.S. 14-52, or of arson, G.S. 14-58, shall suffer death *unless* the jury, at the time of rendering its verdict in open court, recommends that the defendant's punishment shall be imprisonment for life in the State's prison. These statutes were rewritten as now codified by Chapter 299,

Session Laws of 1949. The 1949 Act provided: "This Act shall be in full force and effect from and after its ratification, *not excepting trials for offenses committed prior to its ratification.*" (Italics added.) The application of the 1949 Act to offenses committed prior to its ratification is further indication of the General Assembly's intent that punishment by death was not to be imposed unless the jury was given the discretion to recommend that punishment be life imprisonment and failed to make such recommendation. No changes have been made *by the General Assembly* in any of the provisions of G.S. 14-17, G.S. 14-21, G.S. 14-52, and G.S. 14-58, since the 1949 Act.

The majority (4) were of the opinion that the impact of *Furman* was to invalidate the proviso in each of these statutes; and that, upon invalidation of the proviso, the remaining portion provided unconditionally for punishment by death. The minority (3) were of the opinion that the impact of *Furman* was to invalidate *the death penalty provision* of these statutes; and that, unless and until the statutes were amended *by the General Assembly,* the punishment for each of these crimes is life imprisonment.

In *Waddell,* I expressed by dissenting views in these words: "I do not think *any death sentence* may be constitutionally inflicted unless *our General Assembly* strikes from our present statutes the provisions which leave to the unbridled discretion of a jury whether the punishment shall be death or life imprisonment. In my opinion, this Court has no right to ignore, delete or repeal these provisions, which were put there by the General Assembly as an integral part of its plan for the punishment of crimes for which the death sentence was permissible. *Furman* did not repeal them. This Court has no right to repeal them." *State v. Waddell, supra,* at 453-54, 194 S.E. 2d at 31.

In *Waddell,* I reviewed court decisions of Ohio, Mississippi, Louisiana, Oklahoma, Illinois, Pennsylvania, Arkansas, Washington, Virginia, Florida and Texas, relating to the impact of *Furman* upon statutes of those states containing essentially the same provisions as our G.S. 14-17, G.S. 14-21, G.S. 14-52 and G.S. 14-58. Each interpreted *Furman* as holding that no death sentence could be imposed as long as the statute(s) of that state contained provisions which left to the unbridled discretion of a judge or jury whether the punishment would be death or life imprisonment. Later, decisions to the same effect were handed down in Alabama [274 So. 2d 298 (1973)]; Arizona

[506 P. 2d 248 (1973)]; Kansas [513 P. 2d 248 (1973)]; Maryland [297 A. 2d 696 (1972)]; Massachusetts [300 N.E. 2d 439 (1973)]; New York [300 N.E. 2d 139 (1973)]; South Carolina [192 S.E. 2d 720 (1972)]; Tennessee [496 S.W. 2d 900 (1972)].

The majority opinions in *Waddell* and in the present case cite *State v. Dickerson, Del. Supr.*, 298 A. 2d 761, the only decision which supports to any extent the views of the majority. I now add to the dicussion of *Dickerson* in my dissenting opinion in *Waddell* the following: Further research discloses a comprehensive revision of Title II, Parts 1 and 2, of the Delaware Code, was approved by the General Assembly of Delaware on 6 July 1972 and became effective 1 April 1973. 58 Delaware Laws, Chapter 497. The portion of this revision codified as Section 4209 sets forth in detail a new procedure for determining whether the punishment is to be death or life imprisonment upon a plea or conviction of guilty of murder in the first degree committed on or after 1 April 1973. *Dickerson* was decided 1 November 1972. The statutes to which it relates became obsolete on 1 April 1973. *Dickerson* held that first degree murders committed in Delaware during the five (5) months between 1 November 1972 and 1 April 1973 were punishable by death. My research indicates there has been no decision of the Supreme Court of Delaware since *Furman* which sustains a death sentence. Apparently, the four-to-three decision in this case is the only decision since *Furman* which sustains a death sentence under statutory provisions similar to ours.

The majority opinion in the present case states: "All of the members of this Court agreed that, notwithstanding Furman, these statutes remain in the law of North Carolina, in part, and only in part. The difference of opinion among the members of this Court was as to which part of each such statute remained the law of this State, the original provision making death the mandatory punishment, or the proviso, added by the 1949 amendment, which attempted to confer upon the jury the discretion forbidden by Furman." These sentences do not accurately state the views of the minority. In our view, the provisions of these statutes embody an indivisible and unified plan for punishment of the felonies referred to therein. *Furman* did not purport to delete, isolate or invalidate any particular portion of the statute. *Furman* simply held that the death penalty provision under the statutes as now constituted

is invalid and that, absent amendment, no death sentence can be constitutionally imposed and carried out.

On authority of *Furman*, the Supreme Court of the United States vacated the death sentences which this Court had sustained in the *Miller, Hamby and Chandler, Chance, Westbrook* and *Doss* cases; and, pursuant to the mandate of the Supreme Court of the United States, this Court remanded these cases for judgments imposing sentences of life imprisonment. For citations, *see State v. Waddell, supra*, at 453, 194 S.E. 2d at 30-31. *Furman* did not reinstate death as the only permissible punishment for murder in the first degree, rape, burglarly in the first degree, and arson.

The majority opinion responds to the portions of the briefs of defendant and of the amicus curiae which urge this Court to what the Supreme Court of the United States refused to do in *Furman*, that is, to hold that punishment by death constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States. Being of the opinion that, for the reasons stated herein, the death sentences must be vacated and the cases remanded for judgments of life imprisonment, I refrain from discussing these matters otherwise than by repeating this statement from my dissenting opinion in *Waddell, viz:* "I agree that the *Furman* decision has not established the proposition that capital punishment under all circumstances constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States. Moreover, nothing in the *Furman* decision would seem to invalidate a statute of our General Assembly prescribing death as the sole and exclusive punishment for murder in the first degree, rape, burglary in the first degree, or arson. Whether such a statute should be enacted is for legislative determination." 282 N.C. at 473, 194 S.E. 2d at 43.

Since the provisions of G.S. 14-17 (murder in the first degree) and G.S. 14-21 (rape) are now the same as when *Furman* was decided, I think the only permissible course is *to vacate each of the death sentences* and *to remand the cases for the pronouncement of judgments of life imprisonment.*

Justice SHARP, concurring further in the dissenting opinion of Chief Justice Bobbitt.

To Chief Justice Bobbitt's succinct interpretation of the effect of the *Furman* decision upon our statutes which have specified the punishment for first-degree murder, rape, first-degree burglary, and arson, I can add nothing. He has expressed my views exactly. However, I make the following comments:

In my view the death sentence is not constitutionally impermissible as cruel and unusual punishment for first-degree murder and rape. The question of capital punishment, however, is one of momentous public policy to be determined by the legislature. It is not for this Court to declare either by unanimous decision or four-three division.

In 1949 the legislature, in effect, made the punishment for first-degree murder, rape, first-degree burglary, and arson death or life imprisonment as the jury, in its discretion, might determine. In 1972 the *Furman* decision wrecked that plan by outlawing the imposition of the death penalty under any statute which permitted either judge or jury to impose it as a matter of discretion. On 18 January 1973 this Court, in the four-three *Waddell* decision, completed the destruction of the legislative plan by making the death sentence mandatory for the four crimes when committed after that date. Since these two decisions the legislature has not rewritten the affected statutes. Surely it is time for the General Assembly to exercise its constitutional, legislative prerogative. N. C. Const. art. I, § 6 declares, "The legislative, executive, and supreme judicial power of the State government shall be forever separate and distinct from each other."

STATE OF NORTH CAROLINA v. TOMMY NOELL

No. 10

(Filed 25 February 1974)

1. **Jury §§ 5, 7— jurors acquainted with defendant — challenge for cause — excusal proper**

The trial court did not err in excusing for cause three prospective jurors who stated unequivocally that because of their acquaintance and friendship with defendant and his family they could not find defendant guilty even though the State had convinced them beyond a reasonable doubt of his guilt.

APPENDIX C

Excerpt from
5 ENCYCLOPAEDIA BRITANNICA.
Death

SET FORTH IN THIS APPENDIX ARE PERTINENT EXCERPTS FROM 5 ENCYCLOPEDIA BRITANICA, DEATH, 526-529 (1974 Edition).

* * *

DEATH

Death,. . . has always been viewed with mystery, superstition, and fascination by man. . . What it is,. . . can only be conjectured. It is the supreme puzzle of poets, the concern only of humankind, and the inevitable fate of all things living. . .

THE CONCEPT OF DEATH

Man knows that things die. He witnesses their deaths and sometimes even executes them. These traumatic deaths are easy to understand. A complex living system is quickly and radically destroyed, and it ceases functioning. Natural death,. . . is much more difficult to grasp.

Perhaps when man first discovered that certain slumbers were irreversible, he questioned the difference between that profound sleep and the daily slumbers he experienced. Manifest in ritual, symbol, and philosophical perspective are countless efforts throughout history to rationalize this final reality, the philosophical "why" of which still defies explanation, but the biomedical "how" of which is yielding to investigation.

BIOLOGICAL DEATH. In the economy of nature one generation succeeds another, living its span, then yielding to the

next. Those organisms survive that are best adapted to the prevailing environmental conditions. When those conditions change, the organisms least adapted may no longer be capable of surviving and may migrate to more favourable surroundings or may die. . .

DEATH OF THE ENTIRE ORGANISM. From the earliest days it was known that death of all parts of a multicellular organism did not occur simultaneously. Since the heart was considered to be the central organ, its cessation of function was used to mark the beginning of death for other vital organs. Historically, clinical death has been based on the absence of the heartbeat (and therefore the peripheral pulse) and the absence of breathing (with resultant bluing of the extremities, mouth, and lips). A lack of certain reflexes of the eye is also noted when death is further advanced, with absolute signs, such as algor, rigor, and livor mortis, finally becoming apparent. Algor mortis represents the fall of body temperature to that of the environment. Rogor mortis is the rigidity of skeletal muscles. Finally, livor mortis is the purple-red discoloration of parts of the body as a result of the settling of blood.

. . .

THE PROSPECT OF DYING

The awareness of death is difficult to study objectively. The reality of death for the individual is not dwelt upon but is usually --and thankfully-- of momentary concern. Although each person may be

reminded of death frequently enough, the personal reality of it is often remote. Studies on patients with terminal illnesses who face death imminently have revealed much of interest and psychosocial value regarding the personal response to the approach of death.

THE STAGES OF DYING. Terminally ill patients often go through a series of five stages in accepting the reality of their own finiteness and oncoming death. Most patients initially respond with temporary shock and a mental denial to the first awareness of a fatal, or potentially fatal, illness. Informed about the diagnosis, a patient may not be able to "hear" it and may go from hospital to hospital in an attempt to find someone who will reassure him that his condition is not serious. Eventually, he will face the reality, but often only for brief periods of time, to provide a last will and perhaps make arrangements for dependents.

Sooner or later, however, he will drop his denial and enter the second stage, the stage of anger, during which he complains about any service anyone renders and is difficult to deal with; thus he is often avoided, which only increases his rage. This is the stage at which he no longer says, "no, not me" but instead "why me?" His anger is displaced to the nurse, the physician, the family members, in fact to all the people around him who represent life, energy, and functioning--the very qualities the patient is in the process of losing. The anger also includes God, who "is not listening" to the patient's please for help and good health. Patients who are not made to feel guilty or ungrateful

during this difficult time--who are encouraged to express their anger--will soon proceed to the third stage, the stage of bargaining.

. . .With the realization that he is to die soon, the patient offers a token in exchange for prolongation of life, usually in form of prayers: "if you give me one more year of life, I will become a good Christian," or "I will go to the Synagogue every day," or "I will make a pilgrimage . . ." This is the time of truce, psychologically speaking. The patient is not at peace, though he is more comfortable emotionally and believes that he has a certain extension of life, no matter how brief. He will say "yes, it is me, but. . .," and only when the bargaining time is up will he enter the fourth stage, one of depression. He now faces that certainty that it is truly his life that is coming to an end. He has responded already to the losses he has experienced (an organ perhaps, a job, being home with the family) and gradually descends into deep and silent depression called the preparatory grief. This is the time when he faces the impending loss of everybody and everything he has ever loved. He begins to separate from the living and finally wants only the next of kin by his side. When he has finished all his business, has ventilated his anger and expressed his grief, he will be able to reach the final stage, of acceptance.

A patient who has no moral support and help during this crucial period of his life or who is isolated in a hospital or nursing home will often remain merely resigned to death. He is bitter, unhappy,

and often complains, frequently to the very end of life. By contrast a patient in a true stage of acceptance is almost void of feelings; he may say simply: "My time comes very close and it is all right." If no extraordinary means are employed to prolong his life at this time, the patient is prepared to die with peace and dignity.

Three basic requirements are necessary to assist chronically ill patients to reach this final stage of equanimity: (1) excellent nursing care with adequate pain relief, (2) a flexible management in order to gratify simple needs (lifting severe restrictions against food, drink, and cigarettes), and (3) a hospital staff and a family who themselves accept the reality that this patient is dying and who can openly talk about it, if and when the patient expresses a desire to talk about it.

The patient's hope, originally associated with cure, treatment, or prolongation of life, is then diverted to hope for God's acceptance, for maintaining a sound mind to the end or simply for the well-being of the children or family left behind.

A patient with a genuine faith (of whatever religion, including those that do not believe in an afterlife) dies with less turmoil than one who lacks belief. A person raised in a rural environment or in a non-death-denying society faces death with more equanimity that a person who grew up in an urban environment, where death occurs in hospitals, where children

are "protected" from sharing this experience in a community, and where mortuaries attempt to disguise the reality of death with heavy makeup and other forms of denial.

Family members and attending staff also proceed through these five stages, when personally involved in the care of a dying patient. Parents of dying children and anyone who loses a loved one suddenly and unexpectedly may go through this adjustment after the death occurs--often in a prolonged manner and requiring more time to reach a true stage of acceptance. Widows and widowers often die soon after the death of the spouse, during their own grief process, which apparently renders them more vulnerable to death, often without reaching the stage of acceptance.

A patient is often able to convey his awareness of impending death and will communicate this knowledge to those around him if they are listening. He may comment simply: "My time is very close now and I am ready." He may use symbolic language: "I had this fantasy of a train running rapidly down the hill toward the end of the tracks and I had an argument with the trainmaster. I demanded that he stop the train 1/10th of an inch short of the end." This patient's request for a tenth of an inch represented his bargaining for a very short extension of time to complete some unfinished business. When he accomplished his goal, he died very peacefully a few days later. It is not known exactly how patients realize the moment of impending death, but it is a fact that many of them are able to postpone death psychologically

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or to hasten it (without committing suicide) when they no longer desire to struggle for life.

THE FEAR OF DEATH. The fear of death is universal and consists of two parts. Consciously, people may be afraid of the pain and suffering associated with dying, the separation from the living, or simply the state of non-being or nothingness. Fear of the unknown is frequently mentioned as the most outstanding fear. Much more significant, however, is a fear heavily repressed and often revealed through dream material or, in the case of children through play or in drawings. The often-repressed fear of death is seen as a fear of castastrophic destructive force bearing down and leaving the victim with a sense of utter helplessness, impotence, and rage. It is the fear of a traumatic annihilation that can be seen in children even before they have an empirical knowledge of death. Perhaps this fear originates in attitudes formed during the infantile stage that precede those attitudes imposed by culture or religion. Whether anxiety of death is an inherent property or not, it seems clear from clinical evidence that the early mother-child relationship is an essential source of the death complex in its catastrophic aspects. . . .

APPENDIX D

List of Cases
Acted upon by the
North Carolina Supreme Court
applying *Furman* principles

APPENDIX D

State v. Blackmon, 280 N.C. 42, 185 S.E. 2d 123 (1971), *aff'd.* 284 N.C. 1, 199 S.E. 2d 431 (1973)

State v. Carroll and Stewart, 282 N.C. 326, 193 S.E. 2d 85 (1972)

State v. Chance, 279 N.C. 643, 185 S.E. 2d 277, *vacated and remanded sub nom. Chance v. North Carolina*, (1972) 408 U.S. 940, 92 S.Ct. 2878, 33 L.Ed. 2d 764 (1972), *rem.* 281 N.C. 746, 191 S.E. 2d 65 (1972), *aff'd.* 283 N.C. 102, 194 S.E. 2d 858 (1973)

State v. Cummings, 284 N.C. 420, 200 S.E. 2d 591 (1974)

State v. Doss, 279 N.C. 413, 183 S.E. 2d 671 (1972), *vacated sub nom. Doss v. North Carolina*, 408 U.S. 939, 92 S.Ct. 2875, 33 L.Ed. 2d 762 (1972), *rem.* 281 N.C. 751, 191 S.E. 2d 70 (1972)

State v. Edwards, 282 N.C. 201, 192 S.E. 2d 304 (1972)

State v. Frazier, 280 N.C. 181, 185 S.E. 2d 652 (1971), *vacated sub nom. Frazier v. North Carolina*, 409 U.S. 1004, 93 S.Ct. 453, 34 L.Ed. 2d 295 (1972), *rem.* 283 N.C. 99, 195 S.E. 2d 33 (1972), *aff'd.* 284 N.C. 120, 199 S.E. 2d 431 (1973)

State v. Hamby and *State v. Chandler*, 276 N.C. 674, 174 S.E. 2d 385 (1970) *rev'd. sub nom. Hamby* and *Chandler v. North Carolina*, 408 U.S. 937, 92 S.Ct. 2862, 33 L.Ed. 2d 754 (1972), *rem.* 281 N.C. 743, 191 S.E. 2d 66 (1972)

State v. Miller, 276 N.C. 681, 174 S.E. 2d 481, *rev'd. sub nom. Miller v. North Carolina*, 408 U.S. 937, 92 S.Ct. 2863, 33 L.Ed. 2d 755 (1972), *rem.* 281 N.C. 740, 190 S.E. 2d 841 (1972)

State v. Talbert, 282 N.C. 718, 194 S.E. 2d 22 (1973)

State v. Waddell, 282 N.C. 431, 194 S.E. 2d 19 (1973)

State v. Washington, 283 N.C. 175, 195 S.E. 2d 534 (1973), *cert. den.* 414 U.S. 1132, 93 S.Ct. 537, 38 L.Ed. 2d 757 (1974)

State v. Watkins, 283 N.C. 504, 196 S.E. 2d 750 (1973)

State v. Westbrook, 279 N.C. 18, 181 S.E. 2d 572 (1971), *vacated sub nom. Westbrook v. North Carolina*, 408 U.S. 939, 92 S.Ct. 2873, 33 L.E. 2d 761 (1972), *rem.* 281 N.C. 748, 191 S.E. 2d 68 (1972)

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